No. 11

# UP FROM THE BOMBSHELTER:
## Alternative Courses for the Tobacco Industry

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To: The Tobacco Institute, Inc., its Executive Committee, and Committee of Counsel

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This report is circumscribed by the "bombproof theory" and the phrase "do nothing to render the industry liable,"[1]

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1. Although the tobacco industry has had close calls, it has avoided an adverse decision on liability. We are familiar with the following: Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir.), cert. denied, 375 U.S. 865 (1963); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963), subsequent opinion sub. nom. Hudson v. R.J. Reynolds Tobacco Co., 427 F.2d 541 (5th Cir. 1970); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir.), question certified on rehearing, 304 F.2d 85 (5th Cir. 1962), rev'd, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964), rev'd following remand, 391 F.2d 97 (5th Cir. 1968), rev'd en banc, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970); Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961); Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956), aff'd following remand, 256 F.2d 464 (1st Cir.), cert. denied, 358 U.S. 875 (1958); Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958), aff'd, 328 F.2d 3 (8th Cir. 1964); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341 (W.D. Pa. 1972), aff'd mem., 485 F.2d 678 (3d Cir. 1973), cert. denied, 416 U.S. 951 (1974); Fine v. Philip Morris, Inc., 239 F. Supp. 361 (S.D. N.Y. 1964); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960) (other procedural opinions: 28 F.R.D. 315 (M.D. Pa. 1961); 33 F.R.D. 262 (M.D. Pa. 1963)); Pritchard v. Liggett & Myers Tobacco Co., 134 F. Supp. 829 (W.D. Pa. 1955), rev'd, 295 F.2d 292 (3d Cir. 1961), rev'd following remand, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966), modified, 370 F.2d 95 (3d Cir. 1966), cert. denied, 386 U.S. 1009 (1967). See generally Garner, Cigarettes and Welfare Reform, 26 Emory L.J. 269 (1977).

but it is not bounded by the "doctrine of no." All lawyers, ourselves included, are trained to think "no." If we say "do nothing" and the client does something, then it is the client's responsibility. Ensuing litigation is the client's fault. If the lawyer wins, he's a hero. If he loses, the client has only itself to blame.

Our goal has not been consensus. Political-legal backgrounds differ as do judgments based upon them, so we have not tried to pass the Institute's traditional test of unanimity. It is difficult for any good idea to withstand that test. Unity and consensus are important, but the veto power can become a self-donned straight jacket. As in the United Nations, the value of hanging together is less when the end result is nyet and unanimous hanging. The rule, when bolted to the "bombproof" requirement (which is, in itself, reasonable), makes "doing nothing" all too dear.

The basic premise of this report is that, without affirmative arguments directed to the people, nothing can save the industry. Its short- and long-range goals are dependent upon the nation's ultimate jury--The People. Because techniques tend to become ends rather than weapons, the expertise of those in legislative and litigative work should be freely shared with those involved in issue-oriented mass political education.

Beyond tobacco farmers, industry workers, and those in allied wholesale, retail, and related groups, tobacco

lacks a highly motivated constituency. Many former smokers (and those who want to quit) look forward to prohibition. They bolster their resolve by Alcoholics-Anonymous-like "altruistic" anti-smoking involvement. Since 1960, as their number has grown, the nation's political balance has changed. Factored into this report are the lack of public support for the industry and post-1960 history which indicates:

(1) a massive out-pouring of anti-smoking education;

(2) a fixed public belief that smoking causes lung cancer;

(3) a rise in the percentage of non-smokers, especially in the educated class;

(4) the banning of industry advertisements from broadcast media, especially television; and

(5) other restrictions upon the industry's right to advertise.

In medicine, there is federal dominance due to:

(1) increased federal medical research funding;

(2) the entrenchment of Medicaid and Medicare;

(3) the public acceptance of preventive medicine concepts;

(4) the popularization of health maintenance as a group medical concept; and

(5) majority support for national health insurance.

There have been other changes:

(1) The Vietnam War and the Watergate case have profoundly affected the attitudes of well-educated members of the Assassination Generation.

(2) Marijuana smoking has become socially acceptable.

(3) The civil rights, antiwar, and impeachment movements have demonstrated that issue-oriented citizen action can effect great change.

(4) The era of seniority-based southern congressional power has passed.

(5) State legislatures have been suburbanized under the one-person, one-vote concept.

(6) There has been an increase in the number and strength of "public interest" groups, and the Internal Revenue Code no longer discourages their grass-roots lobbying.

(7) The consumer movement has developed.

(8) The concept of public interest law has been popularized, and "public-interest" political-legal groups have been organized.

So much for the past. The report also looks to the future. In writing it, we have had in mind "conservative" speculations on coming events. Imagine that:

(1) A form of national health insurance is enacted and health costs of smoking are presented as tax-payer or health-maintenance-organization-fee or premium-payer costs. Because there are no provable benefits from smoking, there is nothing for the rational mind to balance.

(2) A younger generation of public interest-minded regulators moves against cigarettes. Even though these agencies (from the FDA to OSHA) adopt "reasonable risk," "comparative risk," and "risk/benefit" balancing tests, the risk of cigarettes is found to be too great, or they are believed to be without benefit.

(3) Private and public institutional research is increasingly supported by federal funds. The population decline results in decreased

enrollments at colleges and universities. Medical, social science, and other faculty members increasingly rely upon federal grant revenues. Students have turned to marijuana and cocaine. Professors who accept tobacco research funds are the subject of scathing attacks in campus newspapers, and these are followed by student demonstrations, sit-ins, and other disruptions in research facilities. Tobacco state universities forego outcaste status, seek increased federal funding, and decline to accept grants from tobacco interests.

(4) The Department of Agriculture, under new leadership, announces the results of research which provides alternative uses and markets for tobacco.

(5) Public disapproval is so widespread and deep that only a small minority demands the product. Termed "addicts," smokers are the subject of scorn. Resistance to prohibition, termed "preventive medicine," no longer exists.

Based upon concerns like these as well as recent attacks upon the industry, we recommend that you authorize appropriate litigation to constitutionally exclude some questions from legislative and political consideration. The constitutional theories we formulate blend property rights with associational and expression rights. We believe that they can be successfully engrafted onto the law in the present property-protective Supreme Court or in a future court whose majority may be more attuned to the enforcement of the first amendment.

We are available to discuss these matters with you, and we await your instructions.

Respectfully submitted,

Charles Morgan, Jr.

CM,Jr./cwm

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## CHAPTER I

## "BOMBPROOF THEORIES" AND MAGINOT LINES

### A Chance to Fight and a Fighting Chance

The public smoking campaign provides the tobacco industry unparalleled opportunity. The anti-smoking forces are fighting on their least medically supportable and, therefore, least rational ground. By seeking authoritarian mandates, they risk 20-year gains in credibility, the diversion of attention from health concerns, identification with governments, court-enforced constitutional protection of the industry, and its return to television.

To turn adversary action to advantage, the tobacco industry must alter some approaches, retain some, discard others. Like merchandising, political-legal tactics are a means to an end, and as times change, minds had better.

While fighting excellent rear-guard and guerrilla warfare since 1954, the industry's approach is defensive and premised upon "cut your losses." Thus, even victories lead inexorably to the outlawing of the product by a public firmly educated against tobacco.

As the Roper Organization, Inc. wrote six years ago:

> . . . these defensive efforts . . . have constituted a series of carefully conducted tactical retreats.
> . . . [U]nless positive action is taken the industry may win every battle and lose the war.[1]

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1. The Roper Organization, Inc., A Proposal to the Tobacco Institute, Inc. 2 (April 1972).

While its lawyers have been successfully defending lawsuits and delaying regulatory and legislative bodies, the industry has been forced to surrender a major part of its right to advertise. It cannot allude to health benefits. It must include ever stiffening warnings on its packages and in its advertisements.

Now the industry markets filter cigarettes and repeatedly lowers their nicotine and tar content. Even its words and phrases have been selected by its opponents. "Tar" is one example. "Mainstream," "sidestream," and "passive" smoke are others. "Cancer" is another.

Tobacco's opposition ebbs, flows, and erodes the industry's base. As Cameron Day, the managing editor of Printer's Ink stated fifteen years ago:

> The cigarette companies . . . have been waiting for a miracle--hoping that the problem will solve itself--but it isn't likely to get better; in all probability, it will get worse.[1]

It's worse.

There is little ground left for retreat. Those who

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1. Quoted in R. Brecher, E. Brecher, A. Herzog, W. Goodman, G. Walker, The Consumer's Union Report on Smoking and the Public Interest 140 (1963) ("CU Report"). Compare the following from the September 10, 1913 issue of the National Liquor Dealers' Journal with regard to the prohibition movement:

> To us there is the handwriting on the wall and its interpretation spells doom. . . . [B]ut when the people decide that the truth is being told about the alcoholic liquor traffic, the money will not count.

Quoted in F. Dobyns, The Amazing Story of Repeal 242 (1940) [hereinafter Dobyns].

smoke feel guilty. Those who do not, feel righteous. Those who have quit are downright sanctimonious. Nine out of ten believe smoking is a health hazard; a majority believe that other people's smoke is hazardous; and two thirds of the industry's customers want to quit.

The magnitude of the problem is found in Roper's most recent campaign: "the most dangerous development to the viability of the tobacco industry that has yet occurred," which could, ultimately, result in a "total ban."[1]

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1. The findings of the Roper Organization nationwide and of V. Lance Tarrance in California coincide. The original California Action Plan (1977) stated that ". . . the Achilles' heel of our position is the question of the effects of second-hand smoke on non-smokers." Id. at 6. It noted that:

> . . . the public perception is that non-smokers can contract cancer from second-hand smoke, [and] the result is obvious: the public will vote for protection from disease over the rights of individuals to enjoy smoking or earn profits.
>
> Nearly half of all Californians now believe second-hand smoke can cause cancer and other diseases. We must convince them that this simply is not true.
>
> This will not be the major theme or thrust of our public education program but it is an issue that must be addressed. We must combat this popular misconception.

Id. at 7.

> We must also correct the widespread misconception that non-smokers can contract cancer or other diseases by inhaling second-hand smoke in public places.

Id. at 17.

But California is not to be used as a testing ground for the industry's quintessentially important educational effort.

To combat this, the industry must rapidly develop a consistent political and legal strategy which will build upon its own strength and its opposition's weakness.

"Notice" is the present policy of the industry. Every package of the product contains "The Warning." The defense to health law suits invokes it. (The industry warrants nothing more than a quality product that the "Surgeon General has Determined . . . Is Dangerous to Your Health.") According to Roper, "There is overwhelming approval for placing notices outside places that restrict cigarette smoking."[1]

Roper adds: "There is majority sentiment for separate smoking sections in all public places . . . asked about." But "[t]here is little sentiment for a total ban . . . in public places."

On doing nothing.--The do-nothing defense is conveniently beguiling. No one person ever makes The Mistake. All make it and do so by doing nothing together.

This common defensive response is often effective. It sometimes works when something needs to be done. It allows the opposition to blunder into mistakes or to founder

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1. In California, the study by V. Lance Tarrance and Associates, A Political Survey of Smoking Attitudes in California, 19 Questions 22-24 (June 1977) (Tarrance I) showed that (when compared with alcohol and saccharin) smoking ranked highest of what people, after full warnings, ought to be able to do. A healthy majority of 65.6% believed that. Yet 45.8% believed they could get cancer from other people's smoke. Id. at 24.

in inertia. But inertia can rapidly disappear. Overnight circumstances can develop which call for action. Once the idea of prohibition is popular, a totally unpredictable and unrelated event can result in the outlawing of a product. For example, once alcohol was on the down side of the domestic debate, it was vulnerable to international happenstance. World War I provided the impetus for prohibition. Beer was German, power ran to Washington, and the nation needed food, not drink. See A Brief Factual and Legal History of Prohibition, Chapter V.

The voter majority has been educated to the "perils of smoking." An articulate minority seeks to motivate them. Once the congressional seniority system stood in their way. However, the rise of the two-party system in the tobacco states and the toll of time have caused the senior southern Democratic senators to move on. Simultaneously, the non-tobacco states gained population, representation, and power.

As anti-smoking attacks grow in boldness and intensity, the industry lobby, repeatedly characterized as "pervasively influential," "powerful," and, implicitly, "dirty," finds itself with no more than ten "go to the well" friends in the House and Senate.

The Real Issue is Prohibition

The world-wide movement against the use of tobacco, like other prohibition efforts, is liberal and idealistic. Because evangelical liberalism and fundamental puritanism seem to blend no better than oil and Holy Water, we presently misperceive leaders like Williams Jennings Bryan. In Bryan's time, prohibitionists were the nation's leading social reformers, and their Anti-Saloon League was a high-minded, persistent, and extraordinarily effective "public interest" group. While President Wilson sought a world safe for democracy, Eugene Victor Debs fought for labor's seat at prosperity's table and the followers of former Secretary of State Bryan searched for a safe, dry place.

Included in the Prohibition movement were drives to outlaw narcotic drugs and cigarettes.[1] Cigarettes, which were newer, had fewer obviously harmful effects than did alcohol and drugs, each of which produced intoxication. Cigarettes survived. The single-family farm was the nation's dominant political force, southerners were the major-domos of the Democratic Party, and tobacco was their cash crop. During Prohibition, tobacco in cigarette

1. And marijuana. "The first state anti-marijuana law was adopted in Utah in 1915." Neier, Public Boozers and Private Smokers, 2 Civil Liberties Rev. 41, 51 (1975).

form acquired the chic social attributes and acceptability of today's increasingly popular agricultural product--marijuana.[1]

History tries to tell us that when articles of pleasure are banned, they are promptly replaced by other articles of pleasure. Hundreds of years ago, the Arabs introduced opium into the Orient. Only a century ago, as a British colony, India grew, refined, and exported much of the world's supply. The anti-opium policy of the United States undermined British influence in the Far East. As opium disappeared, alcohol became a problem.[2] Now, in "opium free"

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1. As the tobacco industry faces bans, a New York Times headline proclaims, "Marijuana Smoking in Public Increases as Penalties Drop," N.Y. Times, Nov. 28, 1977, at 18, col. 1-2 (15 to 20 million smokers and the substance moves into public as opposed to private use; law enforcement ignores small amounts). See also Neier, at 50 (1975).

> Penalties for marijuana possession are decreasing. Until just a few years ago, 50-year sentences were fairly common.

Id. The drug culture magazine, High Times, now proclaims, "Already 4 million Readers" in a full page advertisement. N.Y. Times, June 4, 1978, Week in Review section, at 20. "Sales of loose tobacco for roll-your-own cigarets dropped nearly 14% last year, while sales of cigaret rolling papers climbed 13%, says the Agriculture Department." Wall Street Journal, May 11, 1978, at 1, col. 5. "By a 53-41 percent margin, the American people now favor removing criminal penalties for possession of small amounts of marihuana, according to a recent Gallup Poll." Human Rights, Spring 1978, at 4 (emphasis added).

2. See, e.g., P. Fay, The Opium War (1975); R. McKnown, Opium War in China (1974); D. Musto, The American Disease (1973).

India, the largest democratic nation, there are 158 dry days per year, and the government, dominated by Hindus and Muslims, seeks to prohibit alcohol by 1981.[1] Arab leaders, beset by the problems of industrialization, fired by the Muslim faith, and fueled by oil, quietly increase their anti-tobacco influence over American and international health policy.

Oliver Wendell Holmes wrote that we often "need education in the obvious more than investigation of the obscure. . . ."[2] Fifteen years ago (prior to the 1964 Surgeon General's Report), the Consumers Union spelled out the basic strategy of the anti-smoking forces. The campaign has been undeviating; its effect, cumulative; its scope, worldwide; and its conclusion, on schedule. When the Consumers Union proposed "[t]he prohibition of smoking in designated places," it foresaw that these places would be "constant reminders of the public health hazards of smoking."[3]

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1. N.Y. Times, April 2, 1978, at 10.

2. Holmes, Law and the Court, in Collected Legal Papers 291, 292-93 (1921).

3. CU Report at 178. The Consumers Union wrote:

> The prohibition of smoking in designated places is another kind of control already in widespread use--either as a fire prevention measure, or for the comfort of non-smokers, or for other reasons. . . . .
>
> The current realization of the public health hazards of smoking has led to

> A gradually expanding network of places where smoking is forbidden might similarly serve to remind us, hour by hour and day by day, that smoking is not always and everywhere acceptable. Spitting was once socially acceptable. . . .

CU Report at 179.

In the beginning, the opposition looked to the people, to style, and to social acceptability. They knew

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> suggestions that the number and kinds of places where smoking is prohibited be expanded and that existing rules be enforced.
>
> . . . .
>
> One major argument in favor concerns the need for constant reminders of the public health hazards of smoking.

CU Report at 178 (emphasis added).

1. The CU Report continues:

> [A]nd spittoons were found even in fashionable parlors. Legal bans against spitting in public places helped bring spitting into social disfavor in private places as well. "Wider restriction of smoking in public places," says the Royal College of Physicians Report, ". . . might ultimately contribute much to the discontinuance of smoking by altering social acceptance of the habit."

Id. at 179.

Industry sources should be able to provide information about whether considerations such as a drive against tuberculosis were advanced as arguments against the use of chewing tobacco. We have been advised by the Library of Congress and University Microfilms International (Ann Arbor, Michigan) that no studies of any such campaigns exist.

that the battle was to be waged in the marketplace and that, ultimately, the views of the democracy would be expressed in legislative halls.

> We gradually became a cigarette-smoking nation as a result of constantly repeated, ever-expanding efforts to establish the habit. Some cigarette advertising campaigns failed; others succeeded. As more and more men smoked cigarettes, they became living advertisements for the practice. Anti-cigarette prejudices crumbled, anti-cigarette laws were repealed, and smoking became socially acceptable. Women began to smoke, too, and young people began to smoke at an earlier and earlier age.
>
> All this took time, money, and effort.
>
> Public health educators argue that a similar cumulative effect might gradually convert us into a non-cigarette-smoking nation again. Trial-and-error education programs would have to come first, backed by research to determine what efforts yielded the highest dividends. Each non-smoker would become a living reminder of the reasons for not smoking. Advertising against cigarettes would reinforce such reminders. As attitudes toward smoking changed, moreover, action along the specific lines discussed in the preceding chapters would become possible and advisable. Legal measures, in turn, might then reinforce the effects of the public health education and the special advertising programs.
>
> All this would take time, money and effort, too.
>
> Shall we give the time, spend the money, make the effort? If we don't it will not be for lack of knowledge of the threat or because means of dealing with it are beyond our grasp.

Id. at 209-10 (emphasis added).

The means "to convert us into a non-cigarette smoking nation" are within their grasp. An overnight occurrence could result in the prohibition of the product. Whether termed "public health," "preventive medicine," or "prohibition," the time for the legal measures proposed fifteen years ago nears.

On January 12, 1978, a Baptist President was asked by a Protestant preacher-reporter about Mr. Califano's anti-public smoking campaign and White House staffers "who smoke in public like chimneys." Mr. Carter endorsed health education and supported the Secretary, but added, "it is not his responsibility to tell a particular American citizen whether they [sic] can or cannot smoke." Transcript of Presidential Press Conference No. 23, at 12-13 (Jan. 12, 1978).

> Q. . . . but would you ask your White House staff to set a national example?
>
> A. No, sir.

Id.

Later, the President wrote: "I personally do not approve of prohibition or the use of government authority to prevent people who, after notice, desire to smoke."[1]

A new President, an aroused public, the increased unpopularity of the product, new findings, or the substitution of the words "preventive medicine" for "prohibition" might change that.

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1. Letter from President Jimmy Carter to Congressman L. H. Fountain (Feb. 15, 1978).

Geography: The Liberal Center of the Prohibition Movement

Rapidly becoming the nation's center of communications, the District of Columbia sets political and other style. Its gossip columnists rival those of Beverly Hills and Manhattan, many of its leaders are major and minor media stars, and its per family income is the nation's highest.

The new "government class" (national decisions are made by legislative, executive, and judicial office-holders, each of whom receives a tax paid annual income of at least $54,000) has been salaried into the top one per cent of American income. Many government families earn more than $70,000 per year. Some husband-wife teams earn in excess of $100,000 per year. All who are in decision making jobs have a $40,000 conflict-of-income with average families for whom they decide.

The buildings in which they work are prohibition's building blocks and in them "No Smoking" signs are going up. Surrounding suburban governments are considering anti-public smoking ordinances. Fairfax, Montgomery, and Howard counties, Alexandria, and Arlington have adopted them. An ordinance is pending before the District Council. Once Washington, D.C.'s anti-public-smoking pattern has been firmly established, pressure for national anti-public smoking legislation, and eventually prohibition, will increase.

The liberals--Good businessmen profit from style; liberals set it. In a 41-page memorandum to Harry S Truman, Clark M. Clifford summed it up: "The 'right' may have money, but the 'left' has the pen. If the intellectual can be induced to back the President, he will do so in the press, on the radio, and in the movies. He is the 'idea man' for the people."[1]

Truman knew that these ideas are usually rationalizations. Take the health benefits rationale which provides a Fair Deal for marijuana. Today's common liberal phrases are: "beats alcohol--there's no hangover"; "marijuana calms aggression"; "marijuana cures glaucoma"; "safer than cigarettes"; and "not addicting."[2]

Terms such as "liberal" and "conservative," "civil liberties," "civil rights," and "constitutional rights" are usually words of convenience. Surveys show that most Americans think of themselves as "conservative," yet they favor programs which are best described as "liberal."

Whatever the language, most of us cut constitutional cloth to fit personal philosophy. Phrases such as "the

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1. Goulden, The Superlawyers 80 (1971).

2. When a foreign law enforcement agency sprays Latin American fields with the herbicide paraquat, there is a liberal-intellectual "public-interest" constituency which joins in a war not against the illicit marijuana but against the United States' funding of the law enforcement program.

right to life," "the right to control our own bodies," as well as "the right to clean air," provide psychological underpinning to the "pursuit of happiness" and political goals. Issue-oriented campaigns, conservative and liberal, require reason and emotional motivation. They are enhanced by a rights rationale.

New Deal liberalism is addicted to hope, guilt, aspiration, and altruism. Today Messrs. Califano, Kennedy, and Mondale, and, to a lesser degree, President Carter, have hope, but the national mood has moved away from the triumphant altruism of John Kennedy's "Ask not what . . . ." The dominant theme is that of former President Richard M. Nixon and California's Governor Jerry Brown--"government can do next to nothing"; "lower your expectations"; and "look out for number one."

Without a civil rights or anti-war or anti-poverty or impeachment movement, liberals find that the "times they are a-boring." They join the nation in escape into the fantasy of Rocky, Star Wars, and Close Encounters of the Third Kind.

They turn some of their dissatisfaction inward to good health.[1] As they do so, Mormon influence which

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1. For confirmation of the book-reading (and therefore liberal) public's concerns, consider their fascination with health (and personal appearance) which is reflected by the nonfiction best seller lists. On May 14, 1978, according to the New York Times Book Review, five of the top 15 hardback sellers were:

shapes public policy in several western states, grows as does that of the Seventh Day Adventists who are

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> 1) The Complete Book of Running, by James F. Fixx. (Random House, $10.) For fun and health.
> . . . .
> 4) Adrien Arpel's Three-Week Crash Makeover, Shapeover Beauty Program, by Adrien Arpel with Ronnie Sue Ebenstein. (Rawson Associates, $11.95.) Advice from the head of an international cosmetics corporation.
> . . . .
> 9) Pulling Your Own Strings, by Wayne W. Dyer. (Funk & Wagnalls, $8.95.) Taking charge of your life.
> . . . .
> 11) Looking Out for Number One, by Robert J. Ringer. (Funk & Wagnalls, $9.95.) Getting yours.
> . . . .
> 15) Designing Your Face, by Way Bandy. (Random House, $8.95.) How to use cosmetics.

Id. at 50.

In soft cover trade paperbacks, six of fifteen are related to self.

> 1) The People's Pharmacy, by Joe Graedon. (Avon, $3.95.) Guide to prescriptions, over-the-counter drugs and home remedies.
>
> 2) Crockett's Victory Garden, by James Underwood Crockett. (Little, Brown, $9.95.) Month-by-month guide.
> . . . .
> 5) The Complete Runner, by the Editors of Runner's World Magazine. (Avon, $4.95.) Advice by professionals.
>
> 6) On Death and Dying, by Dr. Elisabeth Kübler-Ross. (MacMillan, $2.25.) Lessons

"among the most rapidly expanding denominations in the nation." New York Times, Feb. 26, 1978, at 24. Health food stores proliferate. "Light" beverages and low-tar, low-nicotine cigarettes are successfully marketed.

Pollsters identify national moods. Their studies are useful, but political-legal struggles are usually won by those who understand the value trends about which public opinion analysts find it difficult to ask.[1] Once perceived, these values must be expressed in political themes and legal theories must pay homage to them. Thus,

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> to be learned from the terminally ill.
>
> . . . .
>
> 8) Our Bodies, Ourselves, by the Boston Women's Health Book Collective. (Simon & Schuster/Touchstone, $4.95.) Illustrated guide.
>
> . . . .
>
> 13) The Taming of the C.A.N.D.Y. Monster, by Vicki Lansky. (Meadowbrook Press, Wayzata, Minn., $3.95.) Warning about "Continuously Advertised Nutritionally Deficient Yummies."

Id. at 54.

1. Of the major polling firms, only Roper correctly called the 1976 general election. Appropriate questions would have indicated that a rurally based candidate would be President. But the right questions were not framed, let alone asked. Often the reflection from television discloses voter concerns. When the Watergate hearings ran first on daytime television and the Waltons ran first in the evenings, it should have been clear that the people were yearning for ages-old predominantly rural and small-town values. They invited Sam Ervin and John Boy into their living rooms. For the White House, they sought Jimmy Carter from Plains and a fatherly, vest-wearing Gerald R. Ford from Grand Rapids.

publicly made arguments are at least as important as properly cited cases, for most judges, whether they read election results or not, are influenced by style.

There must be a yearning for puritanism in the liberal children of affluence. Their social values permanently altered by the abortion and pill-based women's rights (i.e., "sexual") revolution, they move against sugar and other spices of life. Simultaneously, the fear of cancer and heart disease rises as does the percentage of the susceptible elderly in the population. Two disparate generations have become dependent upon quite different kinds of "preventive" medicine, and, ultimately, "preventive" medicine means "prohibition."[1]

In 1973 there was no way to say "Impeach Richard Nixon" without using the unpopular word "impeach." The "impeachment" process was as unpopular as it was misunderstood. It summarized "the excesses of Reconstruction"

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1. The birth-control pill warning provides an example of the skillful use of political science. A rising percentage of young women, married and unmarried, smoke. Freed from the consequences of the sexual revolution, faced with pill and pack warnings, some will not begin to smoke; some will give up smoking; others will forego the pill.

Those who do smoke will be confronted by more studies which "prove" that smoking during pregnancy will injure the fetus and, thereafter, in-home smoking will injure their child. Thus, a third person--and not merely a stranger but her own child--has been injected into the young woman's decision of whether or not to smoke. Pilled or pregnant, her decision to smoke will be an unhappy one. She may blame the product for her personal dilemma.

which white historians had interpreted to generations of school children as all bad. Those who used the word were fumaphobe-like little old ladies in tennis shoes. They were after the liberal Justices Earl Warren and William O. Douglas whom liberal law professors defended by degrading the process itself. Their law reviews reviled the remedy, but the language of political law is subject to rapid re-definition or euphemization. Those who sought the "removal" of Richard Nixon redefined the word "impeach" and made it more respectable. Others called for "resignation." In the dictionary of public health, euphemisms abound, and, if the need for "prohibition" is perceived, the phrase "preventive medicine" fills the prescription.

The Government Will Seek to Declare Nicotine an Addictive Drug

Moves to have nicotine classified "addictive" are likely. Whether successful or not, there is no better way for anti-smoking forces to isolate and envelope smoking in a cloak of social opprobrium. The compass of their logic will force them to follow the trail blazed by anti-"liquor addict"[1] prohibitionists and marked by the Consumers Union.[2]

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1. F. Dobyns, supra at 215.

2. See also Brecher, The Consumers Union Report: Licit and Illicit Drugs Part III, Nicotine, ch. 25, "Nicotine as an addicting drug," 220-28 (1972) and "A program for the future," id. at 241-44.

> First . . . popularize ways of delivering frequent doses of nicotine to addicts without filling their lungs with smoke. . . .

Id. at 241.

> The second direction . . . is to find a nicotine substitute.
> . . . .
> A third fresh direction for anti-cigarette public-health campaigns to take is to tell people the facts about nicotine addiction.
> . . . .
> Messages about nicotine addiction should be woven into the school curriculum. When children first study American Indians, they should learn that Indians were so addicted to tobacco that they could not do without it. When children learn the routes of the great explorers, they should be informed that the

According to Roper, 1978, 29 percent of the people presently believe that cigarettes are addictive. An additional 17 percent volunteered the answer that they are addictive and habit forming. Gallup reports that of pack-a-day-plus smokers who plan to stop smoking, 55 percent want ex-smoker help.[1]

There is evidence that the government is moving toward a declaration of addiction rather than dependence.

(1) On November 10, 1977, Dr. Peter G. Bourne stated:

> President Carter, in a message to Congress on August 2, directed Secretary Califano to study the feasibility of making the Addiction Research Center responsible for coordinated research on a variety of drugs including opiates, alcohol, and tobacco. He also said that, "a sustained effort must be made to identify the reason that people

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> mariners were so addicted to tobacco they had to take supplies with them, and planted tobacco seeds along their routes. The sad plight of nicotine addicts cut off from their supplies--"Tobacco, sir, strong tobacco," and "We die, sir, if we have no tobacco!"--should be understood at a very early age. Full meaning should be restored to the word "addicting," which anticigarette and antiheroin campaigns have debased to the role of a paper tiger.

Id. at 243-44 (emphasis in original).

1. Gallup Poll quoted in Tobacco Institute Newsletter No. 166, Feb. 8, 1977.

turn to drugs including alcohol and cigarettes.[1]

(2) In the President's Message to the Congress on Drug Abuse[2] he stated:

> To improve the quality of federal drug treatment, I am recommending these steps:
> . . . .
> A sustained effort must be made to identify the reasons that people turn to drugs, including alcohol and cigarettes. We should seek more effective ways to make people aware of the health problems associated with such substances (particularly cigarettes and alcohol). . . .

(3) National Institute on Drug Abuse (NIDA) funding for tobacco research and development has been progressive. For Fiscal Year 1975, $66,000 was appropriated. In Fiscal Year 1976, the amount was doubled to $129,000. In Fiscal Year 1977, it was again doubled to $243,000. For Fiscal Year 1978, it was quintupled to $1.3 million.

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1. Remarks of Dr. Peter G. Bourne before the Ad Hoc Committee on Tobacco and Smoking Research of the American Cancer Society, November 10, 1977. In part, this parallels a resolution introduced in the Continental Congress on February 27, 1777:

> That it be recommended to the several legislatures of the United States immediately to pass laws the most effectual for putting an immediate stop to the pernicious practice of distilling grain, by which the most extensive evils are likely to be derived, if not quickly prevented.

Quoted in Dobyns, supra at 215.

2. The message was reprinted by the National Institute on Drug Abuse and distributed by the National Clearinghouse for Drug Abuse Information.

(4) The word "addiction" is commonly used by Secretary Califano and other tobacco critics. See, e.g., Tobacco Institute Newsletter No. 167, Feb. 22, 1977 at 5 ("WE SMOKE because we're physically addicted to nicotine. Period.") (quoting psychologist Stanley Schacter--author of a study on smokers--from an article in Time magazine).

(5) A theory of legal liability based upon the product's "addictive qualities" has been formulated. See, e.g., Garner, Cigarettes and Welfare Reform, 26 Emory L.J. 269, 301-04 (1977).

Common Understandings, the Law's Fifth Column, and the Danger of Judicial Knowledge

The reflexive avoidance of health issue confrontations[1] and the package and advertisement warning that "Cigarette Smoking is Dangerous to Your Health" result in widespread public acceptance of commonly known, yet unproved, "medical facts." Overnight, without notice or an opportunity to present the industry's position, these common understandings may be finally adjudicated and, in effect, legislated without a legislature.

Like the rest of us, judges, even Justices, rely upon their own "knowledge." Brown v. Board of Education, 347 U.S. 483 (1954) was based upon the personal knowledge of the Justices, their political beliefs, and the rising tide of public opinion, as well as sociological studies of the effects of racial segregation. Id. at 494-95 & n.11. In Reynolds v. Sims, 377 U.S. 533 (1964), the one man, one vote case which allowed legislative bodies to move from agricultural to suburban values, it was the Court's own knowledge which moved it to end a nationwide legislative apportionment impasse.

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1. In a recent New York case, both sides conceded "[t]hat the challenged price differential was enacted for the purpose of promoting public health." People v. Cook, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452, 455 (1974). The decision upheld a price differential based on tar and nicotine content as a valid exercise of the police power over matters pertaining to health. The court noted that tobacco is "now recognized as a substance dangerous to public health" and that this recognition "justifies greater legislative control." 312 N.E.2d at 456 (emphasis added).

In the abortion cases, Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), medical knowledge influenced constitutional judgment. With friends and family members who were physicians (one Justice in the majority had even served as counsel to the Mayo Clinic), they were as aware of the facts of the case as were counsel.

McGuffey's Reader and the Blue Back Speller unified our language and established national moral values. Print advertising built upon this base. As commerce centralized, so did government. We developed national products and national communication.

Mothers and fathers, even coaches, told young men, "Don't smoke." Those who smoked heard, "It's bad for your health; it will stunt your growth; it will shorten your wind."

Simultaneously, their peers said, "have a drag," as they passed the cigarette from hand to hand. Besides, their grown-up heroes smoked cigarettes. Girls followed boys. Cigarettes were stylish. Radio and talking pictures fed the style. Humphrey Bogart and Arthur Godfrey, Edward R. Murrow and Johnny, the Hit Parade, "Two Cigarettes," and "Smoke Gets in Your Eyes" were a part of our national experience, our language, and our lore. "Cigarettes and whiskey and wild, wild women" were pleasant experiences. Smart people smoked, so smoking was smart. Intellectuals and idea men expressed themselves in the press, on the

radio, and in the movies.

Times change. Today, television brings us to our common understandings.

In the early 1950's, Dr. Alton Ochsner wrote of cigarettes and lung cancer, the well-filtered Marlboro Man mounted his horse, the Supreme Court struck down the symbol of the segregated public school house, and television rode into the American home. The school desegregation case triggered mass-movement, rights-related citizen action campaigns. Television carried social revolutions into living rooms. Every night, young Americans saw action in the underside of Birmingham and the undergrowth of Vietnam. Newsmen were the new intellectuals. As they analyzed and agonized, they transmitted changes in style. Hair grew longer and voices grew louder as the young merged into blue-jeaned "unisex." Levi Strauss' product became as popular as running shoes. A century ago, gossip was the poetry of politics. Tonight, Johnny Carson's cigarette will be off-camera in quiet contrast to yesterday's movie on an alternate channel. The people have arrived at a common understanding and the doctrine of judicial notice allows courts to accept it without proof. In early tobacco cases, state supreme courts did so,[1] but in 1900, the

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1. See, e.g., State v. Olson, 26 N.D. 304, ____, 144 N.W. 661, 667 (1913), appeal dismissed, 245 U.S. 676 (1917) ("The courts can certainly take judicial notice that the use of tobacco in any form is uncleanly, and that its

Supreme Court of the United States relied, in part, upon the product's global "popularity and value" to reject the technique. Four justices in the majority in Austin v. Tennessee, 179 U.S. 343, 348 (1900), agreed that:

> Cigarettes do not seem, until recently[1] to have attracted the attention of the public as more injurious than other forms

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excessive use is injurious. They can take judicial notice of the fact that its use by the young is especially so."); State v. Olson, supra ("We believe that we can take judicial notice of the fact that many contend that the use of snuff between lips and the gum has a tendency to paralyze the nerves of that portion of the face."); Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009, 1009-10 (1915) ("We think it manifest that tobacco is not a foodstuff. It does not tend to build bodily tissue, and as to the average adult, its tendency is widely thought to retard the building up of fatty tissue. In respect of its use by the young, it cannot be doubted that it tends to stunt normal development and even growth in stature."); State v. Packer Corp., 77 Utah 500, ___, 297 P. 1013, 1016 (1931), aff'd, 285 U.S. 105 (1932) ("We refer to these [judicial notice] cases, not that they decide the question before us as to the validity of restrictions on advertising, but because they show that tobacco and cigarettes are classed by the courts as agencies harmful to health and welfare, and are subject to restriction, control, and regulation within the exercise of the police power.") (emphasis added); State v. Ohmer, 34 Mo. App. 115 (1889) ("There is no sentiment in tobacco. It is merely monster.").

1. See N. Tilley, The Bright Tobacco Industry, 1860-1929 504 (1948):

> A successful cigarette machine . . . was invented in 1879, but it exerted little influence . . . . Duke first used the cigarette machine in 1884, but certain improvements were necessary . . . . [T]he most significant changes had occurred by 1900.

Id. at 504, 569.

> of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to endorse the opinion of the supreme court of Tennessee that "they are inherently bad and bad only."

and, id. at 345,

> [W]hile its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. . . . Whatever might be our individual views as to its deleterious tendencies, we cannot hold that any article which Congress recognizes in so many ways is not a legitimate article of commerce. [Emphasis added.]

The Austin dissenters agreed:

> No one can question the sincerity of the legislature of Tennessee . . . . And yet there is no consensus of opinion as to the fact of such evil.

Id. at 368.

On April 25, 1978, the Supreme Court of the United States wrote:

> Separate mortality tables are easily interpreted as reflecting innate differences between the sexes; but a significant part of the longevity differential may be explained by the social fact that men are heavier smokers than women.
>
> . . . .
>
> Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate.

City of Los Angeles v. Manhart, 98 S. Ct. 1370, 1376 (1978) (footnotes omitted and emphasis added).

The social and health consequences of smoking are no longer perceived to be the problems of smokers alone. The public smoking issue brilliantly implicates otherwise disinterested persons in the political process by inserting third party injuries into the cost analysis.

Manhart indicates intellectually sound ways in which previously helpful and traditional economics-tax revenue arguments can be turned against the industry.

The cost of social medicine (including private individual and group coverage premiums, health maintenance organization fees, and the taxes for national health insurance) will be computed to outdistance tobacco tax revenues. At least 39 life insurance companies already offer a premium discount to those who have abstained from cigarette smoking for one or more years.[1] Health care costs rise due to the demands of an aging voter population and inflation. One answer is the exclusion of smokers from selected coverage. Another is the "rating" of smokers. However, the certain political answer is "cure" the cigarette addiction with preventive medicine. This requires "public education" or "public relations," which really means "political action." Tobacco will be made a convenient scapegoat for ever-rising

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1. To qualify, the insured signs a statement of abstention similar to the Dry Pledge. National Underwriter Company, Who Writes What in Life and Health Insurance 224 (1976).

non-smoker taxes. In issue-oriented politics, minds are made up every day, so each day is election day. Yet the industry has not found a way to face the health issue, let alone the health cost issue.

Fifteen years have passed since the Consumers Union termed the industry's basic approach the "as if" response. They stated that while "neither manufacturer nor customer wants to admit that the health charges are true, both have acted as if they are."[1] Dr. Michael Shimkin charged "obfuscation close to actual lies."[2] Francis Bello, the editor of Scientific American, remarked that "[e]ventually, the findings will be accepted by everyone."[3]

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1. CU Report at 127. Quoting Printer's Ink, the CU Report (no doubt desiring an outright guilty plea) commented,

> The time has come, obviously, for the T.I.R.C. (and its equally ineffectual companion, the Tobacco Institute) to drop this injured, defensive tone and say and do something more positive. The industry's current problems won't just disappear . . . by disclaiming them.

CU Report at 111.

After discussing the trend to filters, the CU Report presented as

> [a] final example of the "as if" response [the fact that] . . . the companies are diversifying. . . . It would seem to be a good way of hedging their bets.

CU Report at 130.

2. Id. at 112.

3. Id. at 121.

Then the Consumers Union reported an "industry truce" in the "tar derby."[1] Now, even though the cutting edge of The Warning has been dulled by the development and marketing of low tar, low nicotine cigarettes, it has been sharpened by advertising which tells how little cigarette there is in cigarettes.

Because of widespread popular beliefs, the "as if" response, and the non-existence of research to prove health benefits from tobacco smoke, the FTC, FDA, Congress, or a mere member of the medical establishment can successfully make almost any health claim and the industry is defenseless.

Tomorrow, the industry will be extremely vulnerable to a Surgeon General's "finding" that low tar, low nicotine cigarettes lead to increased smoking; that the additional number smoked increases carbon monoxide intake and cardio-vascular difficulty; or that extraction or chemical flavoring processes increase health problems.

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1. Commenting on an "industry truce," the CU Report stated:

> Moreover, by calling off the infighting that characterized the Tar Derby, the cigarette industry succeeded in extricating itself from the embarrassing position it had occupied since the health disclosures of the early 1950s--that of constantly reminding its customers through its own advertising that cigarettes carried a real threat to their health.

Id. at 145.

Additionally, as Tabitha M. Powledge recently wrote,

> Emphasis on the social and economic burdens of smoking is a relatively new argument. It is also a powerful one and the tobacco interests haven't decided yet just how to counter it.
>
> . . . .
>
> But the costs of medical and hospital bills engendered by cigarette-related illness were estimated . . . in 1975 to be close to 10 percent of the total U.S. health bill of $122 billion.
>
> . . . .
>
> With health care expenses approaching 10 percent of the gross national product, more and more declamations are going to begin "Society can no longer afford. . . ."[1]

Because major social reform legislation is really written by the democratic majority (and this is especially true since the rise and dominance of television), "as if" pleas lead to "common understandings" and, ultimately, judicial as well as legislative legislation. Without affirmative, additional, aggressive, and innovative "as if but" responses, the "bombproof theory" can become the industry's Maginot Line.

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1. Powledge, No Smoking: New Sanctions for Old Habits, 8 Hast. Center Rep. 11, at 11-12 (1978).

Creating Credibility by Finding Facts to be Credible About

The industry has gone from "nine-out-of-ten doctors" to "may be harmful" to "is dangerous."[1] The product itself has passed the point of no retreat. If national health law enforcement moves to a "reasonable risk"[2] or "comparative risk"[3] or a "risk benefits"[4] approach, those in other industries will aim at cigarettes as The Number One Enemy of Public Health.[5] See for example "Sweet Risk?,"

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1. Because the industry makes no health claims, it suffers the pile-on effects of twenty years of statistical studies and constant retreats--to filter cigarettes; to king-size filter cigarettes; to king-size filter cigarettes two-thirds smoked; and now to all of the above with an ever-decreasing amount of tar and nicotine and advertising which emphasizes the health threat and further educates the public against the product.

2. The risk is so minor that there need be no concern.

3. What is the risk of the questioned item when compared with others? Can that comparative risk be explained on a label?

4. What statistical or "man-year" risk does the product or ingredient present, and how, if at all, does it benefit its users or society as a whole?

5. See, e.g., American Capitalism Sees the Profit in Physical Fitness, New York Times, June 12, 1978, at B-14, cols. 1-6:

> With its usual vigor, American capitalism is mounting an attack upon the comfortably sedentary sloth of the desk-bound, and corporate fitness programs are multiplying almost as fast as brands of running shoes.
>
> . . . .
>
> Our medical insurance costs were going up at a rate of 12 percent a year, and we decided to try wellness. . . .
>
> . . . .
>
> Premature death of employees currently costs

Time March 13, 1978 at 72, in which each saccharin-laced soft drink is said to reduce life expectancy nine seconds compared with a loss of 12 minutes per cigarette.[1]

To do combat, the industry must develop credibility, but credibility is of little use unless you have facts which you want rational people to believe. These rational

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> American industry an estimated $25 billion per year, and . . . most companies are only too happy to subsidize their cardio-vascular health.

1. The saccharin products warning label would make a cretin think twice:

> USE OF THIS PRODUCT MAY BE HAZARDOUS TO YOUR HEALTH. THIS PRODUCT CONTAINS SACCHARIN WHICH HAS BEEN DETERMINED TO CAUSE CANCER IN LABORATORY ANIMALS.

The Saccharin Study and Labeling Act, 21 U.S.C. § 343(o)

A risk-benefits label might add the following:

> . . . regarding the problem of obesity and the drinking of one 100 calorie soft drink per day. If all other things were unchanged, the substitution of diet for non-diet drinks would increase life expectancy by 100 times more than the cancer risk reduced it.

Quoted material taken from "Sweet Risk?" supra.

The reasonable risk approach might result in the following label:

> The risk of one diet soft drink per day is two days per average life-time.

A comparative risk label might read:

> Regarding the problem of cancer, the drinking of one 100 calorie soft drink per day reduces life span by nine seconds. Each cigarette reduces life span by 12 minutes.

people presently have an intensive, selective, and "certain knowledge" that cigarette smoke:

1. is the major cause of lung cancer;

2. has other adverse health consequences;

3. provides no substantial health benefits; and

4. harms the health of the non-smoker.

Consequently, they have to believe that they and the world would be better off if there were no cigarettes. Yet not even the industry knows the facts. The greatest omission in a century of cigarette advertising is the history of universal unsubstantiation.[1] Some of what was

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1. See, e.g. State v. Crabtree Co., 218 Minn. 36, 15 N.W.2d 98 (1944). A corporation was convicted of selling cigarettes without a license. The Minnesota Supreme Court wrote:

> Without assuming to ourselves any expert knowledge on the subject, we express grave doubt as to the accuracy of the claims made for their products by tobacco companies, who have spent millions in attempting to dissuade the public from the thought that the use of cigarettes is harmful physically . . . . [O]ur credulity is not sufficiently robust to give even a semblance of reality to such claims. In fact, much of the discussion on the subject in commercial radio programs and in newspaper and magazine advertisements is directed to the claims that the product which is presently being sponsored causes less throat irritation, or fewer coughs, or in general is less harmful than the rival brands. It seems fair to infer from these conflicting claims that even the nondeleterious physical effect of cigarettes generally is at least

said may have been true, but we can no longer say it.[1] "Reach for a Lucky instead of a sweet" may be excellent

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a debatable question . . . .

218 Minn. at ___, 15 N.W.2d at 99 (emphasis in original). Robinson v. American Broadcasting Co., 328 F. Supp. 421 (E.D. Ky. 1970), was an action brought by tobacco growers to enjoin the broadcast of anti-smoking commercials. A Kentucky federal district judge wrote:

> [T]he Court can, and does, notice that since the onset of the widespread public discussion of reports relating smoking to health, a fair characterization of much cigarette advertising has been the triumphant claim for the individual brand, "ours won't hurt you as much ".

328 F. Supp. at 425.

1. Compare the effect of benefit area research with adjudications of unsubstantiated health claims: Liggett & Myers Tobacco Co., 55 F.T.C. 354 (1958) (prohibiting advertising that Chesterfield cigarettes or the smoke therefrom would have no adverse effect on respiratory system or that Chesterfields are milder or less irritating that other brands); R.J. Reynolds Tobacco Co., 48 F.T.C. 682 (1952) (order prohibiting representation that Camels encourage flow of digestive fluids, relieves fatigue, and other unsubstantiated claims); American Tobacco Co., 47 F.T.C. 1393 (1951), modified, 48 F.T.C. 1161 (1952) (order prohibiting false claims, including claims that Luckies are less irritating); P. Lorillard Co., 46 F.T.C. 735, modified, 46 F.T.C. 853, modified, 186 F.2d 52 (4th Cir. 1950) (order prohibiting false or unsubstantiated claims regarding coolness of the smoke and the tar and nicotine content); R.J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950), modified, 192 F.2d 535 (7th Cir. 1951), modified, 48 F.T.C. 682 (1952) (finding that nicotine is not a therapeutic agent and that smoking is injurious in various degrees to all of the bodily systems; order prohibiting false or misleading claims regarding effect of smoking defendant's cigarettes); R.L. Swain Tobacco Co., 41 F.T.C. 312 (1945) (order prohibiting false claims of endorsement by members of the medical profession and that cigarettes soothed throat, nose, and mouth).

medical advice. Without knowing the dietary effects of nicotine or other cigarette components, advertisers can neither prove nor make health claims.

Without beneficial facts the statistics will look worse; the package warning will be "as iffed" and reinforced by low tar, low nicotine advertising; and, inexorably, public opinion will work its will against the industry.

The Smoking and Health Report of the Advisory Committee to the Surgeon General of the Public Health Service, U.S. Department of Health, Education and Welfare (1964) [the "Report"], states at page 71:

> Most but not all experimental and clinical evidence supports the popular view that smoking reduces appetite.

Well prior to the issuance of the 1979 Report of the Surgeon General, the industry should thoroughly analyze "the large list of possible physical benefits" of tobacco use.[1] Benefit-area questions unanswered in 1964 and 1978 should be catalogued.

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1. The 1964 Report states on page 355 that

> A large list of possible physical benefits can be compiled from a fairly large literature, much of which is based upon anecdote or clinical impression.
>
> Even in those circumstances where a substantial body of fact and experience supports the attribute, the purported benefits are comparatively inconsequential in a medical sense. Examples are . . . an anti-obesity effect upon reduced hunger and a

After that, systematic, focused research programs should be aimed at the benefit areas which industry experts believe to be the most likely to provide favorable evidence and at least partial answers to major non-cancer health problems. These expenditures should be considered as essential and income-producing as expenditures for advertising and new product development.

For adequate funding, physicians may be found to carefully study selected health areas such as cardiovascular disease with emphasis upon obesity and stress. If the industry must pay more for these workers than the government and the American Cancer Society, so be it. Their products can be extraordinarily valuable. Their professional reputations need not rival that of Jonas Salk. Their politics matter no more than do those of Linus Pauling. Their care and integrity do matter and renown will follow knowledge.

Without direct involvement, industry spokesmen should encourage the funding and discussion by others of marijuana health-issue research. There are health risks in

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possible elevation in blood sugar. [Citation omitted.] Insofar as those are supported by fact they represent tangible assets and cannot be totally dismissed. On the other hand, it would be difficult to support the position that these attributes would carry much weight in counterbalancing a significant health hazard.

But it is not an easy matter to reach a simple and reasonable conclusion concerning the mental health aspects of smoking.

all other substances of pleasure. The elimination of marijuana as an alternative and healthful smoking product would not only place risks in perspective and spread guilt, it could curb the self-righteousness of many liberal, health conscious, anti-tobacco advocates.[1]

When favorable health facts are found, the most aggressive marketing organizations in the United States can project them, the finest law firms can fight for their right to do so; and "as if but" responses will buttress sales by providing the industry something to be credible about.

With regard to the public smoking issue, that "something" already exists. Credibility does not.

Publicly-funded anti-cancer organizations are credible; so are anti-public smoking groups and spokespeople. They have no apparent ulterior (i.e., economic) motive; they are believed to be altruists.[2]

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1. See, e.g., A Few Marijuana Cigarettes Weekly Over Long Period May Harm Lungs, Washington Post, B-5, cols. 4-6. May 16, 1978:

> . . . the lung effects were more marked in the chronic (three cigarettes per week for more than five years) marijuana smokers than in men who smoked 16 or more cigarettes every day.

2. These voluntary "altruistic" associations almost always are grass root political structures awaiting leadership. Alabama Senator Lister Hill's effective political organizations grew from health organizations. Those involved learned that annual fund drives were an opportunity to organize and to educate the public regarding the state's (and Senator Hill's political) health needs.

The Supreme Court has elevated commercial speech to first amendment status, but industry's words still will be rightly perceived as "selfish."[1] (This does not mean that the industry should be quiet. To the contrary, even if its words are self-serving, self-serving words are better than no words at all.)

For good reasons, average citizens trust few institutions. If the income of well-salaried altruists[2] comes from "cancer-causing," air (and water) polluting industries, their credibility is subject to the same selfish-motive attack. Prior to 1968, most "public interest" organizations lacked political strength. Under Nixon they were "outsider" critics. Now, many of their officers and employees have been appointed to high regulatory positions. Some believe that those who do "good works" are not bound by rules which apply to conflicts of

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1. The industry should spend little money in a direct effort to convince the public that it is concerned about the health and safety of its customers. In California, while 78.2% believe the tobacco industry is "not too concerned," the liquor industry, which has advertised "concern," tallied a "not too concerned" 75.4%. Tarrance I at 19.

2. The American Civil Liberties Union's membership growth demonstrated how innovative major national programs, which were precluded by tradition, could produce mass membership. The organization quintupled its membership by direct entry into the civil rights and anti-Vietnam movements and the movement to remove President Nixon from office. Consequently, "altruists'" salaries almost kept pace with those paid for federal "public service."

"private" interests. Mr. Justice Rehnquist recently wrote, "We can of course develop a jurisprudence of epithets and slogans . . . in which 'ambulance-chasers' suffer one fate and 'civil liberties lawyers' another," In re Primus, 46 U.S.L.W. 4519, 4527 (U.S. May 30, 1978) (Rehnquist, J., dissenting), but some of today's public servants do rule on contentions which their private organizations make, and that does smack of "conflicts of interest." Justice Rehnquist continued:

> It is even more reasonable to fear that a lawyer in such circumstances will be inclined to pursue both culpable and blameless defendants to the last ditch in order to achieve his ideological goals.

Id. at 4528. Public disclosure of these conflicts and attacks based upon their "unfairness" (and the inevitable hypocritical justifications which will follow) can undermine the effectiveness of these regulators.

The federal medical establishment is itself a gigantic Achilles' heel. Despite its opposition to "socialized medicine," "private" medicine has come under governmental control. "Peer review" assures research mediocrity. As "peers" revolve between the "public" and "private" sectors, governing and conferring, they know that today's grantor is tomorrow's grantee. Medicare, Medicaid, limited entry into the profession, and governmental funding of

hospitals, medical colleges, and research leave only the physicians' charges and hours of service to the free market. Although their greed is great, the congressional desire is less to oversee than it is to overlook. There may be billions buried in the barnyards of research. We should help the blind hogs root them out.

Each pronouncement on tobacco products comes from the people who brought you the swine flu vaccine, lost billions of tax dollars in the sewers of the welfare system, and presided over the crises which threaten the public schools. It was the Public Health Service which allowed human experimentation on narcotic addicts and stored the Central Intelligence Agency's secret assassination weapon, shellfish toxin.

Even if they believe what they say, the war waged by the men of medical science continues not merely because tobacco is an easy and, therefore, appropriate target, but, as importantly, because there is gold at the end of the research rainbow. To cut their profit margin, find facts, and diminish their credibility, the men of medical science should be subjected to litigative diagnosis. No profession has more reason to be fearful of litigation, the effect of which is not unknown to this industry. Those from the tobacco states should understand that Massive Resistance dulls the ardor of

most (but not all) reform-oriented lawyers and organizations. It is truth coupled with the stamina of convictions which wins in the long run. Thus all critical governmentally-funded studies should be evaluated by our own researchers.

Ordinarily, statistical evidence shifts the burden of proof from proponents to defendants. In law and life, statistics establish a prima facie case. To destroy that case (and effectively question the opponents' credibility), one must truthfully attack the statistics and, thereafter, produce better and accurate figures. To do that, the industry should always initiate requests for the government's basic research data under the Freedom of Information Act, 5 U.S.C. § 552.

If "political scientists" do shoddy, incomplete, and biased work, the industry, companies within it, their health issue legal counsel, and their in-house or independent researchers should be armed with the other side's facts. Under the Act, "any person," including a corporations, is entitled to all non-exempt "records," and "records" range from computerized data to films and X-ray films. Without "records," the industry is helpless; with them, bogus research can be exposed, and from the destruction of the opposition's credibility, the credibility of industry counter-research can flow.

Of equal importance, a consistent industry policy of data acquisition provides the means of oversight which will make "political scientists" more cautious in their claims.

Simultaneously, the oversight curiosity of Congressman L. Richardson Preyer should be encouraged. As Chairman of the House Subcommittee on Government Information and Individual Rights, he can help the sun shine through bureaucratic smog and encourage responsiveness to freedom of information requests.

Even at the risk of burdening institutional and other political advertisements, we should make it easy for people to believe us. Because the industry has no credibility, all references to fact, whether in advertisements, pamphlets,[1] or other documents should be footnoted. When people are referred to, names should be provided.[2]

By following other basic rules, the industry can gain insights and blunt resentments. For example, even though the product has evolved into greater female use, there are few women in industry councils. Because no "benefits"

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1. See, e.g., the pamphlet "The Cigarette Controversy" (1974), which does say, "Statements in this booklet are fully documented. For a list of reference sources . . . , write the Tobacco Institute. . . ." That is insufficient.

2. One industry political document contains the following remark: "As a leader of one such group has stated, . . . ." Another says, "A Washington State legislator walked out in protest." Both should have provided the names of the persons.

are attached to its use, the product is as "worthless" as cosmetics. The male medical establishment is far more likely to deceive itself, let alone the public and ban "non-essential" products like hair dye than would sexually-integrated regulatory teams.

Linkages between The Pill and cigarettes would be more carefully established if women ran the linking process. Females within the industry might bring to it an instinctive and personal as well as reasoned understanding. They could better publicize the fallacies of the medical men whose breast X-rays gave women cancer and who, thereafter, removed the problems with radical mastectomies.

There is little difference between the manners and style of today's Bill Cosby and yesterday's Bing Crosby, but members of minority groups understand the languages of their own subcultures. Because times change and the industry's product is political, their inclusion in high councils is more a business necessity than a social advance.

In much of our political literature, neither blacks nor Chicanos are pictured. As styles change, so does language and the concepts it represents. Thus, "Indians" become "Native Americans" and "Negroes," "black people." Today we commonly use terms such as "anti-smoking militants" and "zealots." They should be test-marketed on the subcultures whose improved status came from "militants" and

"zealots." These words may please the industry, but they probably bolster the morale of the opposition and provide it satisfaction.

In the enemy camp, especially in the New York Times, we should create our own Fifth Column by advertising admissions against interest. As pointed out in a recent paper,[1] avowed critics of tobacco such as Dr. Ernest L. Wynder of the American Health Foundation do not believe that "passive smoking really hurts the health of somebody who sits next to you. . . ."[2] Dr. Jonathan Rhoades, Chairman of the National Cancer Advisory Board, said of atmospheric tobacco smoke and health that, to the best of his knowledge, "it is not, in fact, actually harmful."[3] Dr. E. Cuyler Hammond of the American Cancer Society stated that there "was no shred of evidence" that a non-smoker can get cancer from "secondhand" smoke. There is evidence that he cannot. To suggest that passive smoking could

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1. Jacob & Medinger, Public Smoking, N.Y. (1978).

2. Wynder, E.L., statement made on Barbara Walter's television program, Not for Women Only, WRC-TV, NBC Network, Washington, D.C., April 18, 1974. Radio TV Reports, Inc., Washington D.C., at 11. Wynder's American Health Foundation is embarked upon a pilot obesity program funded by the National Cancer Institute. You're Fat America!, Washington Post, Feb. 16, 1978, at E-20.

3. Rhoades, Jonathan, Jr., comment during "A Discussion of Smoking and Health," Newsprobe, WTAF-TV, Philadelphia, Pa., July 16, 1975, at 9.

cause cancer is dishonest, said Hammond, and he is prepared to so testify in court.[1]

National advertising should appeal to the people's good sense as well as to the product's good taste. As importantly, the authors of all advertisements and public relations efforts should constantly have the "guilt factor" in mind.

Smokers feel guilty, and other industries have learned to transfer and use guilt. "Don't be a litterbug," says the "public interest" advertising campaign which is conceived by those who market disposable containers. "Don't waste energy," says the industry which profits from the shortage which, the people are told, was caused by their automobiles, their waste, their gluttony. "It's people who kill, not guns," say the manufacturers of handguns. And so it goes.

But not with cigarettes.

This industry not only has no scapegoat; it serves as the scapegoat for others.[2]

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1. Hammond, E.C., "What are the High Risk Groups for Public Education? How does Epidemiology Identify Them?" in Summary Proceedings of the International Conference on Public Education about Cancer, 18 UICC Technical Report Series 13.

2. There is apparent resistance to attacking members of the business fraternity. There is little reciprocation by brothers in the bond. Tobacco attacks no one and sooner or later (unless great changes occur) tobacco will be blackballed or rather, expelled.

Industry-sponsored "courtesy advertisements" should carefully place a part of the burden of courtesy and guilt upon non-smokers.

They must speak to smokers but they should also sanction non-smokers and enunciate Emily Post-like rules for them. The themes should include:

> If you don't allow smoking in your home, tell your prospective guests when you invite them.
>
> If you don't allow people to smoke, tell them so on the outside of your taxicabs and places of business.
>
> Those who are unwilling to do these simple things are more interested in confrontation and controversy than good manners.

Institutional advertising, especially in the South, should be drawn upon a canvas of pride and patriotism. Political documents should be laced with history. As Dr. Peter G. Bourne said, "No matter how much we may favor prohibition of tobacco products, we are 300 years too late."[1]

Industry public relations should without subterfuge include the production of music and the funding of books by outstanding writers who will present the history of the product as well as the facts applicable to its use. Patrons

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1. Remarks of Dr. Peter G. Bourne, Special Assistant to the President for Health Issues, before the Ad-Hoc Committee on Tobacco and Smoking Research, American Cancer Society, November 10, 1977.

have existed throughout history. Patronage charges arise from surreptitious funding and that destroys credibility.

From the lore of "Native Americans," and of the white man's history following Columbus' discovery of "the leaf-gold," there is a storehouse of folk tradition. The presidents who grew tobacco (including Washington, Jefferson, Madison, and Jackson), who used it (from Lincoln through Ford), and their armies, offer ample historical and topical material.

As a region, the South (and its congressional representation) is extremely important, for population growth will enhance its power as tobacco's "base precinct."[1] Without a South non-partisanly pro-tobacco, the industry may as well be dead. The area came alive with the advent of air conditioning.[2] Now increased personal income, a

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1. The state police power to regulate may pose problems for manufacturers in non-tobacco growing states. The prospects of state and local option prohibition should be a factor in plant site selection decisions.

2. Today air conditioning presents the industry with a clearly foreseeable and present danger. To help meet it, systematic action should be undertaken with other entities.
State, county, and municipal building codes set forth ventilation standards. They ordinarily are written by local contractors and suppliers, and labor groups.
Federal architectural standards are set by some 23 departments and agencies ranging from the Department of Agriculture to the Veterans Administration.
New building ventilation requirements are influenced by the AIA Research Corporation. Because of the energy shortage, new building construction is moving away from perpetual heating and cooling systems to increased natural ventilation, including operable windows.

(footnote continued on next page)

rising level of education, the elimination of racial segregation, and the influx of "outsiders" make Bob Dylan's words, "the times, they are a-changin'," especially applicable in the Old Confederacy.

To be proud of ourselves, and to enhance worker morale, we should carefully stick to the truth. Perceptions of guilt lead to confessions whether guilty or not. Confessions are good for the soul, but bad for cases and campaigns. When people feel guilty, they exude it. Even though the industry should exalt The Warning (for, unlike other products, tobacco provides notice), it is benefit-area research, the dispersion of guilt, marijuana health research, and truthful attacks on the credibility of the medical establishment which will provide relief from the opprobrium presently attached to industry employees. That approach coupled with the air of anti-authoritarianism which flows from "I'd rather fight than quit" litigation should bolster the morale of those who work for tobacco companies as it strengthens the wills of those who smoke.

Most of us desire to fight real enemies. Most of us rarely manage to do that. One way to diminish opposition

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(footnote continued from preceding page)

It is almost too late, but by retaining expertise and seeking a voice in planning, some of tomorrow's public smoking problems, including probable rulings by the Occupational Safety and Health Administration, may be avoided.

Additionally, it is in the planning, research, development, and design stages of new aircraft, automobile, bus, and passenger car construction that the industry should offer its advice and assistance.

is to render it foolish and incredible. Today, "fools smoke." Tobacco's men are not believed. Tomorrow, by squarely placing the blame for air pollution--and, at least in some cases, cancer--where it belongs, the issue may be diverted. Besides, if everything causes cancer, all care, yet none care. Already industry opponents are troubled by the inclusion of so many other products in the "bad-for-you" column, for, when all are guilty, none seem to be. And so it goes with coffee, dairy products, bacon and eggs, hamburgers and hot dogs. Soon God will be blamed for cholesterol--motherhood and country, for stress.

Another way of saying that industry opponents are "foolish" (rather than "militant" or "zealous") is to help them see themselves as "ineffective." If "ineffective," their ardor will decline. Facts should be developed to undercut the health importance of the anti-public smoking issue. (In restaurants and bars, a "non-smoker would inhale from 1/100th to 1/1000th of a filter cigarette per hour. . . . The risk of . . . adverse health effect . . . [is] non-existent."[1])

The issue has an inherent "litterbug" quality which may render it "silly" and appealing to none more powerful than the present-day followers of Harold Stassen. Roper writes:

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1. Quoted from "A Response to Public Smoking Claims," Enclosure D of Submission to Commissioner, State Department of Health, New Jersey, at 8 (Oct. 27, 1977).

Another short range tactic is suggested by the question concerning "fumaphobes." The findings suggest that there is the possibility of dividing those who are relatively unexcited about the passive smoking issue from the anti-smoking zealots, by portraying these zealots as people with an unreasonable fear of cigarette smoking.[1]

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1. Among a number of phobias are: bromidrosiphobia (fear of body odors); botanophobia (intense fear of flowers and plants); pantophobia (fear of everything); topophobia (stage fright); taphephobia (fear of being buried alive); and zoophobia (fear of animals). It is pantophobia which this industry must avoid.

The Creation of a Southern States Agricultural Council

Scatter-shot,anti-cancer weaponry has been aimed at the agricultural products of the South. Joint agency assaults include the FTC's and FDA's attacks on sugar and aflotoxin, the "cancer causing" mold which infests peanuts and rice.

White southern farmers are one of President Carter's base constituencies. They are equally essential to the development of a new Republican Southern Strategy. HEW, the FDA, the FTC, and other "anti-agriculture agencies" can be summed-up in the single spat-out word: "Washington."

The creation of a council to protect the southern way of agriculture could provide tobacco the rumble seat ride in a wide-load vehicle designed to convey the arguments of those who wish to denounce regulatory agencies, cajole Congress, and pressure presidents.[1]

As the Supreme Court wrote in Austin v. Tennessee, 179 U.S. 343, 388 (1900):

> The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops

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1. Even without a council, Democratic tobacco-state congressmen, senators up for re-election, other nominees, state chairmen,and national committee members should ask the President to restrain,on partisan political grounds, "Washington's" anti-agriculture pronouncements until after the November election.

> of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any state, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of the courts, and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances. [Citation omitted.]

To this, the most threatened industry, "devolves" the duty to organize the growers of Confederate State "commodities in which a right of traffic exists."

The Development of a Body of Law

The roof of the bombshelter wears thin. Each study, ordinance, statute, rule, or regulation is a chance to fight to fashion the law--and to rebuild the industry's safe haven. Some challenges should be brought in state courts under state constitutions, preferably in the southern tobacco states. Others should be filed in federal courts; but beyond cases, scholars within the industry's many law firms should be encouraged to publish so their practice won't perish.

There is little favorable discussion in legal literature.[1]

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1. See, e.g., Garner, Cigarettes and Welfare Reform, 26 Emory L.J. 269 (1977); Comment, Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air, 3 Colum. J. Env. L. 62 (1976); Note, Tobacco Pollution and the Nonsmoker's Right, 4 Env. L. 451 (1974); Siler, Legal Liability in Tobacco Products Cases, 53 Ky. L.J. 712 (1965); Note, Toward Recognition of Non-smoker's Rights in Illinois, 5 Loy. U.L.J. 610 (1974); Comment, The Resurgence and Validity of Antismoking Legislation, 7 Prob. L. & Med. 167 (1974); Note, Legislation for Clean Air: An Indoor Front, 82 Yale L.J. 1040 (1973); Note, 26 Albany L. Rev. 354 (1962). See also Drayton, Tar and Nicotine Tax: Pursuing Public Health Through Tax Incentives, 81 Yale L.J. 1487 (1972); Little, Products Liability--The Growing Uncertainty About Warnings, 12 Forum 995 (1977); Lloyd, Right to Smoke, 6 Lawyer 15 (1963); McArdle, Dissection of a Cigarette Cancer Case, 15 Fed. Ins. Coun. Q. 71 (1965); Palmer, Express Warranties Arising From Advertising, 41 J. Air L. 497 (1975); Philpot, New Citadel: Enterprise Liability for Inherently Dangerous Products, 25 Food Drug Cosm. L.J. 414 (1970); Rossi, Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored, 34 So. Calif. L. Rev. 399 (1961); Wegman, Cigarettes and Health: A Legal Analysis, 51 Cornell L.Q. 678 (1966); White, Strict

The value of learned-journal-presented legal concepts is overstated by those who have nothing better to do than write law review articles. But, they do provide ideas for lawyers who have nothing better to do than file lawsuits--and they do provide authority for judges.

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Liability of Cigarette Manufacturers and Assumption of Risk, 29 La. L. Rev. 589 (1969); Comment, Sales-Warranty and Negligence Liability of Cigarette Manufacturer for User's Lung Cancer, 26 Alb. L. Rev. 354 (1962); Comment, Can Cigarettes Be Merchantable, Though They Cause Cancer?, 6 Ariz. L. Rev. 82 (1964); Comment, Cigarettes, Cancer, and the Implied Warranty of Wholesomeness, 13 Cath. U.L. Rev. 40 (1964); Comment, Torts: Cigarettes, Lung Cancer and the Implied Warranty of Merchantable Quality, 50 Calif. L. Rev. 566 (1962); Comment, Cigarette Advertising and the Public Health, 6 Colum. J.L. & Soc. Prob. 99 (1970); Comment, Cigarettes and Vaccine: Unforeseeable Risks in Manufacturer's Liability Under Implied Warranty, 63 Colum. L. Rev. 515 (1963); Comment, Deadly Weed: Cigarettes Are In Trouble, 5 Houst. L. Rev. 717 (1968); Comment, Products Liability--The Cigarette-Cancer Cases, 11 Kan. L. Rev. 287 (1962); Comment, Product Liability--The Protection of Strict Product Liability Held To Extend To an Injured Party Who Is Neither a User Nor a Purchaser, 3 Loy. U.L.J. 421 (1972); Comment, Cigarette Manufacturer's Warranty: Application of Old Law or New, 11 Vill. L. Rev. 546 (1966); Note, 26 Alb. L. Rev. 354 (1962); Note, 42 B.U.L. Rev. 250 (1962); Note, 8 Cumb. L. Rev. 579 (1977); Comment, 18 De Paul L. Rev. 829 (1969); Note, 61 Mich. L. Rev. 1180 (1963); Note, 14 S.C.L.Q. 439 (1962); Note, 36 St. John's L. Rev. 368 (1962); Note, 35 Temp. L.Q. 345 (1962); Note, 39 U. Det. L.J. 444 (1962); Note, 15 Vand. L. Rev. 1019 (1962); Note, 9 Wayne L. Rev. 383 (1963); Note, 13 West. Res. L. Rev. 782 (1962).

Adequate reasons no doubt exist for the following statements found in Garner, supra at 269 notes * and **:

> Following its tradition of presenting both sides of any legal controversy, on February 8, 1977, the Emory Law Journal invited the chief executive officers of several tobacco companies to submit a separate or joint rebuttal to Professor Garner's article. Those companies were

Social conduct and style are no more contagious than are legal theories cloned from a few facts and ancient doctrine.

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American Brands, Inc., Liggett Group Inc., Loews Corporation (P. Lorillard Co.), R.J. Reynolds Tobacco Co., and Philip Morris Inc. A similar invitation to submit a response on behalf of the entire industry was extended to the Tobacco Institute on February 15, 1977.

. . . .

The Board of Editors of the Emory Law Journal would like to thank the personnel of the National Clearinghouse for Smoking and Health, and especially Dorothy Daniels, for their help and cooperation on this article.

## CHAPTER II

## THE CLONING OF CONSTITUTIONAL RIGHTS: FREEDOM OF ASSOCIATION AND PRIVATE PROPERTY

We recommend the initiation of litigation to strike down legislation which forbids private property owners to allow free and nonrestricted assembly by smokers in their businesses, restaurants, hotels, bars, stores, and similar facilities.

Courts and the rights of property.--There is an underlying theme to two centuries of constitutional law: the courts, traditionally conservative, protect the owners of property from the trespasses of the democratic majority. "Property and law are born together, and die together," wrote Jeremy Bentham, the great English legal reformer. "Before laws were made there was no property; take away laws and property ceases." J. Bentham, Theory of Legislation, Principles of the Civil Code, Part I, 112 (Dumont ed. 1864).

When outsiders threaten to march, meander, or legislate their way onto privately held land, the owners turn to courts to erect, repair, and guard constitutional walls.[1]

Courts retreat from that duty when the trespassers' power grows so strong that retreat provides property its

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1. The right to private property is "one of the pillars of Western faith." J. Cribbet, Principles of the Law of Property 6 (1962). "Only as the individual has specific, and to a limited extent, exclusive, rights

best defense. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq.

New Deal court-authorized governmental regulation was a stile which provided the multitude very narrow access. The owners of property promptly turned the regulatory process to their private gain. Wise counselors urged cooperative enterprise, compromise became a redeeming social virtue rather than a tactic of last resort, and law schools trained their students to balance rights, distrust juries and voters, and to play down "the rights of property." Today, much of the Washington legal establishment, within and without the government, private and "public" interest, seems to believe that governments have an inherent "right" to control the use and enjoyment of the people's private property.

Yesterday's reform is today's renegade. Survey after survey discloses general public disgust with government. An outsider rises to power with the campaign incantation, "I am not a lawyer; I am not from Washington; and I won't lie to you."

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over a thing, does he have that liberty of action which is vitally necessary to the preservation of a free society." Id. at 7. See, e.g., First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Santa Clara County v. Southern P.R.R., 118 U.S. 394 (1886); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

The general frustrations of American life, the decline of quality workmanship, the devaluation of the American Dream, and the growth of gigantic and inefficient bureaucracies, have subjected government itself, let alone the regulatory process, to widespread public attack.

Public health regulatory agencies are more popular than others. Even assuming their survival, growth, and ultimate recontrol by many of the industries which they regulate, the tobacco industry will find them treacherous friends. In traditional constitutional courts the industry has a chance. In the courts of political medicine, it has none.

Current and proposed governmental regulations tell private property owners who may or may not assemble and associate upon their land for commercial or social purposes. Most anti-public smoking statutes and ordinances are indiscriminate: they treat property uniformly regardless of its ownership. They are based upon the New Deal's underlying assumption that, to Congress and the courts, it is personal conduct and majority well-being which matter most.

For example, Secretary Joseph A. Califano, Jr.'s Model State Clean Indoor Air Act seeks to prohibit "smoking in public places and in public vehicles, except in designated

areas." Id. ¶ 2. The Act defines "indoor public places" as "any enclosed area during times in which it is open to the general public," id. ¶ 3(2); "public vehicle" as "any common carrier or vehicle available for hire to the general public," id. ¶ 3(3); and "workplace" as "any enclosed area in which persons engage in work," id. ¶ 3(4). It then uniformly covers privately-owned and governmentally-owned property with a prohibition and an exception and, elsewhere in the Act, regulation. Its prohibition provides:

> No person shall smoke in an indoor public place or in a public vehicle except in an area designated as a smoking area.

Id. ¶ 4(6).

Obtaining Constitutional Protection for the Tobacco Industry

A look at the place rather than the person.--Property may be divided into two categories--publicly owned property and private property. Private property may be divided into several categories, three of which are (1) privately owned residences; (2) optional use commercial property; and (3) monopoly use commercial property. The present right of the private homeowner to establish smoking rules even when inviting the public onto his premises is so clear that it will not be discussed further.

Optional use and monopoly use commercial property are open to that portion of the public which meets two basic requirements:

1. The desire to purchase the goods and services offered for sale; and
2. the money to pay for them.

Optional use commercial property may be defined as places where goods or services are offered for sale and the consumers retain options due to the existence of like or similar alternative places. In most cities and towns, restaurants, bars, hotels, and motels provide easy examples. Monopoly use commercial property is that property where goods or services are offered for sale but where the consumer has no alternatives. Privately owned one-of-a-kind public transportation facilities, stadia, and hospitals provide examples.

A look at the first amendment.--"Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances," wrote the Founders.

Citizens are free to assemble for political purposes. They also are free to speak on political questions. The Supreme Court has expanded the right of expression to cover speech for commercial purposes. See, e.g., Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977). Recently protection has been extended to the non-business related speech of corporations. First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978).

Commercial first amendment rights will be more restricted than political speech, especially when the commercial claim is false or deceptive. Compare Ohralik v. Ohio State Bar Association, 46 U.S.L.W. 4511, 4513 (U.S. May 30, 1978) ("commercial speech [afforded] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values") with In re Primus, 46 U.S.L.W. 4519, 4526 (U.S. May 30, 1978) ("[A] State may regulate in a prophylactic fashion all solicitation activities of lawyers . . . in the case of speech that simply 'propose[s] a commercial transaction' . . . . In the context of political

expression and association, however, a State must regulate with significantly greater precision"). See also Bates v. State Bar, supra; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Analytic analogy of necessity will result in reasoning similar to that applied to more traditionally protected speech. Emphasis on the right of consumer association should enhance property rights and provide an altered standard of review for the property claim. See, e.g., Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir.), cert. denied, 46 U.S.L.W. 3616 (U.S. April 3, 1978) (Listerine advertisements need not say "Contrary to prior advertising"); Beneficial Corporation v. FTC, 542 F.2d 611 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977) (corporate advertiser may use slogan "instant tax refund"); FTC v. National Commission on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976) (purveyors of cholesterol need not tell of increased risk of heart disease).

Optional use commercial property.--The owner of optional use commercial property clearly has a constitutional right to exclude from the premises those who refuse to conform to prescribed codes of conduct, which may include dress (coats, ties) and companionship (couples only)--if the property is otherwise open to the public regardless of race, religion, or national origin.

He may also exclude classes of persons due to their status or habits. He may establish "No Smoking," "Smoking," and "Separate Sections." The very hair, dress code, and like cases which limit personal lifestyles and the trespass-after-warning cases which arose from the sit-ins of the early 1960's establish this optional use commercial property right.

By providing entrance-way notice to those offended by cigarette smoking and thereby preventing, by a process of self-exclusion, any injury which might occur to the few who may be allergic to tobacco smoke, the health hazard, if any, and the need to balance the rights of smokers versus non-smokers is eliminated.

Dimes and dollars are the ballots of commerce, and, in the democracy of the marketplace, private premises are precincts.

Notice is the present policy of industry. Every package of the product contains "The Warning." The defense to health law suits invokes it. The industry warrants nothing more than a quality product that the "Surgeon General has determined . . . is harmful to your health."

According to Roper, "There is overwhelming approval of placing notices outside places that restrict cigarette smoking."[1] Roper adds: "There is majority sentiment for

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1. In California, the study by V. Lance Tarrance and

separate smoking sections in all public places . . . asked about." But "[t]here is little sentiment for a total ban . . . in public places."

Optional use commercial property owners can construct a legal right to limit association upon their property to those who smoke and to those who do not smoke but who desire to associate with smokers, or to purchase goods and services as non-objectors. The first amendment may be employed to protect the smokers' freedom of association.

The coupling of fifth and fourteenth amendment protected property rights with the first amendment right of free association may subject restrictive legislation to the Supreme Court's most rigorous test of constitutionality--the compelling interest test. Compare Buckley v. Valeo, 424 U.S. 1, 25 (1976):

> The Court's decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," [citation omitted] that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." [Citations omitted.] In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

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Associates, A Political Survey of Smoking Attitudes in California 19, Questions 22-24 (June 1977) (Tarrance I) showed that (when compared with alcohol and saccharine) smoking ranked highest of what people, after full warnings, ought to be able to do. A healthy majority of 65.6% believed that. Yet 45.8% believed they could get cancer from other people's smoke. Id. at 24.

As the commercial association private property concept is introduced into the law, the less drastic alternative test should be employed. Depending upon the nature of the premises, posted notice of the smoking policy will be the less drastic alternative.

Governmentally owned property and monopoly use commercial property which partakes of the attributes of governmentally owned property.--The freedom of assembly clause, notice, and the less drastic alternative test should also be employed for those categories of property. The government as owner has only slightly less right to refuse to allow smoking, or alternatively, to regulate it, than do the owners of optional use commercial property. Government may reasonably regulate the conduct of those who enter its premises; thus, the best defenses are political. If these are unsuccessful, court challenges on a variety of bases are possible.

Because the regulations apply to first amendment associational rights, traditionally strict rules should be invoked. They include the "less drastic alternative," "compelling governmental interest," and "void for vagueness" tests. When there are no alternative places to assemble, the case for "smoking allowed" becomes harder and the courts will be less likely to see rights as absolute. Non-smoking may be required. In frontal assaults, a case can be made

against total bans, but separate sections will be the less drastic alternative.

Rights on a tightrope: the avoidance of a "balancing test" by the provision of notice.--Balancing tests allow the regulation of unpopular acts or views.[1] When balancing, first amendment rights are usually subordinated to the government's will.[2] The provision of notice by private property

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1. See, e.g., Barenblatt v. United States, 360 U.S. 109 (1959).

2. See, e.g., Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), which upheld a regulation permitting the broadcasting of radio programs in streetcars and buses. Objectors contended "that the radio programs interfere[d] with their freedom of conversation and that of other passengers by making it necessary for them to compete against the programs in order to be heard." Id. at 463. But the evidence did not compel a finding "that the programs interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places." Id. at 463 (emphasis added).

But suppose that in Pollak, the Public Utilities Commission had found a public smoking health hazard and non-smoking passengers were a majority of the users of bus transportation. Assume that Pollak had contended the smokers invaded the non-smokers' zone of privacy and the court balanced that against the smokers' contention that it is they who are entitled to protection.

Now read Pollak.

> This claim is that no matter how much Capital Transit may wish to use radio in its vehicles as part of its service to its passengers and as a source of income, no matter how much the great majority of its passengers may desire radio in those vehicles, and however positively the Commission, on substantial evidence, may conclude that such

owners entirely eliminates non-smokers' health as a basis for balancing.

The industry is currently subject to the whims of the democratic majority, rather than the "democracy of the marketplace." "Notice" or "free choice" statutes and ordinances which merely require notices at entrances into public places are likely to benefit an industry which has no basic rights.

For an easy example, assume all taxicabs in which smoking is prohibited have been required to post stickers on the windows or passenger entrance doors in letters three inches high saying "No Smoking." Presently, it is convenient for the taxicab owner to escape ashtray cleaning by banning upholstery burns. Additionally, once the passenger is inside the cab, he is likely to accept the driver's no smoking mandate. If required to post an exterior notice,

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use of radio does not interfere with the convenience, comfort and safety of the service but tends to improve it, yet if one passenger objects to the programs as an invasion of his constitutional right to privacy, the use of radio on the vehicles must be discontinued. This position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy

the taxicab driver will never know how many fares he has lost and how much money he has missed because of his sign. Exterior notice provides the consumer democratic choices, and forces the taxicab driver to speculate upon and accept the economic cost of his conviction.

Even constitutional rights can be waived. Surely non-smokers, like smokers put on notice by the package warning, will be held to have waived their rights when they enter clearly posted private property.[1]

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> may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. . . .
> In a public vehicle, there are mutual limitations upon the conduct of everyone, including the vehicle owner.

343 U.S. at 463-64. "[M]utual limitations" would require that the smoker give up his absolute right to smoke. As the court noted in Pollak, "The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others." 343 U.S. at 465.

Justice Douglas wrote a strong dissent in Pollak, based on the right of privacy. "If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold." 343 U.S. at 469.

1. Even critics would find it hard to complain. One commentator suggests that society's paternalistic interest should be limited to confronting "smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks to health exactly are." J. Feinberg, Legal Paternalism, in Today's Moral Problems 33, 43 (1975). To proscribe smoking outright, and thus to substitute the

The thrust of Warren Court criminal case decisions was notice--once the criminal defendant has notice of his rights, his confession is valid. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966). The Burger Court also emphasizes notice. See, e.g., Faretta v. California, 422 U.S. 806 (1975), which held that the sixth amendment right to counsel included the right of self-representation. "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." 422 U.S. at 833-34. The Court, of course, recognized that, in almost every trial, the defendant would be better off represented by an attorney, but rejected the argument that an attorney should be forced upon an unwilling defendant. "Personal liberties are not rooted in the law of averages. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" 422 U.S. at 834, quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring). Blackmun, dissenting,

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medical judgment of the state for the personal choice of the individual "is paternalism of the strong kind . . . and creates serious risks of government tyranny." Id.; accord Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 620 (1977).

characterized the majority opinion as bestowing a "constitutional right on one to make a fool of himself." 422 U.S. at 852. This is precisely the virtue extolled by Justice Black dissenting in Bell v. Maryland, 378 U.S. 226, 332 (1964). "'The preservation of a free and pluralistic society would seem to require substantial freedom for private choice. . . . Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind.'"

It was this right of free choice which motivated Justice Black to write, "[T]he property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will." 378 U.S. at 331 (emphasis added).

Rowan v. United States Post Office Department, 397 U.S. 728 (1970), upheld a federal statute requiring a mailer to delete a name from a mailing list if, in the addressee's sole discretion, he wished to prevent pandering advertisements from entering his premises by mail. The court rejected the first amendment argument that a vendor has a right to send unwanted material into the home of another. "If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." 397 U.S. at 738.

If balancing is required, accomodation between the

property owner's rights and the rights of non-smokers "must be obtained with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); accord, Hudgens v. NLRB, 424 U.S. 507 (1976). As labor cases illustrate, "a trespass is far more likely to be unprotected than protected." Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 46 U.S.L.W. 4446, 4453 (U.S. May 15, 1978). The scale may tip in favor of union organizational activity when carried on by an employee already rightly on the employer's property. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). When carried on by non-employees who have no general right to be present, the employer's property interest may overcome the interests of the organizers. See Hudgens v. NLRB, supra at 521-22 & n.10. This difference is "one of substance." NLRB v. Babcock & Wilcox, supra at 113.

As NLRB v. Babcock & Wilcox indicated, the property owner's interest may have to give way when there are no other alternatives.[1] See also Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). However, most commercial property is

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1. In NLRB v. Babcock & Wilcox, alternative channels existed for communication between employees and union organizers and, therefore, the intrusion on the property owner's rights ordered by the National Labor Relations Board was unwarranted.

optional use; alternatives exist because there are available other like enterprises. Except in very limited circumstances, there are other grocery stores, other taxicabs, other employers, even other doctors. If these other places and services exist, the balance should tip in favor of the property owner's associational right to determine to whom he will offer his services.

Recognition of the right of free choice requires that the individual take steps to avoid situations which may produce unwanted unpleasantness. As Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975), recognized,

> . . . the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Or nose.

The Property Owner's Right To Choose

The establishment of the right of a private property owner to admit at his discretion with or without segregation, smokers or non-smokers, or both (after advance notice), requires the blending of existing constitutional themes--freedom of association and the rights of private property.

The right of association.--The right to speak freely and to assemble to petition government for a redress of grievances has been expanded far beyond the redress of grievances. "While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." Healy v. James, 408 U.S. 169, 181 (1972); see Baird v. State Bar, 401 U.S. 1, 6 (1971); NAACP v. Button, 371 U.S. 415, 430 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). The right has been recognized in a variety of circumstances. Perhaps the best remembered cases are those involving civil rights. In NAACP v. Alabama ex rel. Patterson, the Court characterized the right as follows:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has

> more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations omitted.] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations omitted.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (emphasis added).

The right of association is the "right . . . to pursue . . . lawful private interests privately and to associate freely with others." Id. at 466. This position was amplified in Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974): "The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." As the Court said in Griswold v. Connecticut, 381 U.S. 479, 483 (1965),

> The right of "association" . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while

> it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Freedom of association includes the "right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing.'" NLRB v. Granite State Joint Board, Textile Workers Union, 409 U.S. 213, 216 (1972) (citation omitted); accord, Booster Lodge No. 405 v. NLRB, 412 U.S. 84 (1973). See also Civil Rights Act of 1964 § 201(e), 42 U.S.C. § 2000a(e). In clubs and organizations the individual may choose the persons with whom he wishes to associate privately, regardless of whether or not that choice is discriminatory. Runyon v. McCrary, 427 U.S. 160 (1976); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The rationale was stated in Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977): "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

This "freedom of belief" is commensurate with the other first amendment freedoms.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

> what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943). As James Madison stated in defense of religious freedom: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison 186 (Hunt ed. 1901).

The right of association has been held to include the right to promote the rights of homosexuals, Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), cert. denied, 98 S. Ct. 1276 (1978); Gay Students Organization v. Bonner, 367 F. Supp. 1088 (D.N.H.), modified on other grounds, 509 F.2d 652 (1st Cir. 1974); the right to have private clubs with racially discriminatory admissions, Moose Lodge No. 107 v. Irvis, supra; Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976) (en banc), and sexually discriminating admissions, New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975); Korzenik v. Marrow, 401 F. Supp. 77 (S.D.N.Y. 1975); and the right not to join a student group, Good v. Associated Students of University of Washington, 86 Wash. 2d 94, 542 P.2d 762 (1975).

The right of association, like its speech counterpart, may not be unreasonably regulated by the state. The state may not restrict the right "simply because it finds the views expressed by any group to be abhorrent," Healy v. James, 408 U.S. at 187-88, nor deny or unnecessarily abridge the associational rights of a group by denying it the opportunity or a forum in which to present its views. Healy v. James, 408 U.S. at 181; Thornhill v. Alabama, 310 U.S. 88, 103-06 (1940). In the words of Justice Stewart: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

As the Court noted in NAACP v. Alabama ex rel. Patterson, supra, to deny the right of association, the government must show compelling interest. Accord, Buckley v. Valeo, 424 U.S. 1, 25 (1976).[1] See also Cousins v. Wigoda,

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1. In Buckley, which dealt with a constitutional challenge to the Federal Election Campaign Act of 1971, as amended, 88 Stat. 1263, the Court applied the less drastic alternative test:

> Even a "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

424 U.S. at 25 (citations omitted).

419 U.S. 477, 489 (1975); Gilmore v. City of Montgomery, 417 U.S. at 575; NAACP v. Button, 371 U.S. at 438. For a discussion of the compelling governmental interest test and its application in recent cases, see Kant, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 26-38 (1977); Note, The Supreme Court, 1976 Term, 91 Harv. L. Rev. 128-208 (1977).

Property Rights of Private Owners

The first sentence of a discussion of property rights is found in the fifth and fourteenth amendments. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The fifth amendment further proscribes the government. It prohibits the taking of "private property . . . for public use, without just compensation." These constitutional provisions played a significant role in the Supreme Court's decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The "basic issue" in Lloyd was whether "respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling." 407 U.S. at 567 (emphasis in original). The Court held that respondents could not.

Prior to Lloyd, there had been some confusion regarding the right of persons to exercise their first amendment rights on private property which was generally open to the public. This grew from Marsh v. Alabama, 326 U.S. 501 (1946), which involved Chickasaw, Alabama, a "company town" wholly owned by the Gulf Shipbuilding Corporation. Except for its ownership, "it [had] all the characteristics of any other American town." 326 U.S. at 502. The issue was whether the town

could prohibit a person from distributing religious literature on a sidewalk even though the owner of the town had posted a notice which read: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Id. at 503. The Court held that the owner, Gulf Shipbuilding, could not prohibit completely the exercise of first amendment rights.

> We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. . . .
>
> We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a "business block" in the town . . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

326 U.S. at 505-08 (emphasis added). Marsh lead to Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

In Logan Valley, the Court upheld the right of union members to peacefully picket a store in a privately owned shopping center. The case "squarely present[ed] the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances . . . ." 391 U.S. at 315. After noting that the "similarities between the business block in Marsh and the shopping center in the present case are striking," 391 U.S. at 317, the Court stated that it saw "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership." Id. at 319.

> Such a power on the part of respondents [to prevent members of the general public from using the mall premises in a manner contrary to the wishes of the owner] would be, of course, part and parcel of the rights traditionally associated with the ownership of private property.

Id. In his dissent, Justice Black, author of the majority opinion in Marsh, saw a very good reason for distinguishing Marsh from Logan Valley. In his sharply worded opinion, Black stated:

> I believe that, whether this Court likes it or not, the Constitution recognizes

> and supports the concept of private ownership of property. The Fifth Amendment provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.

391 U.S. at 330 (Black, J., dissenting). Black then wrote that the majority had misconstrued his opinion in Marsh.

> The majority opinion then concludes that since the appellant in Marsh was given access to the business district of a company town, the petitioners in this case should be given access to the shopping center which was functioning as a business district. But I respectfully suggest that this reasoning completely misreads Marsh [sic] and begs the question. The question is, Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town . . . . I can find nothing in Marsh which indicates that if one of these features is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

391 U.S. at 332 (emphasis in original). Lastly, Black disputed the majority's contention that "[t]he shopping center premises are open to the public to the same extent as the

commercial center of a normal town." Id. at 319.

> Of course there was an implicit invitation for customers of the adjacent stores to come and use the marked off places for cars. But the whole public was no more wanted there than they would be invited to park free at a pay parking lot. . . . To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.

Id. at 332-33.

Justice Black's view was vindicated by Hudgens v. NLRB, 424 U.S. 507 (1976). There the Court held that union pickets had no first amendment right to enter a private shopping center for the purpose of advertising their strike against an employer.[1] The Court relied on Lloyd Corp. v. Tanner,

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1. The Court used an interesting inverse reasoning process to overrule Logan Valley:

> If a large self-contained shopping center is the functional equivalent of a municipality, as Logan Valley held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content. For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes [citations omitted], and may even forbid altogether such use of some of its facilities [citations omitted], what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of

supra, which had upheld the right of a private shopping center owner to prohibit the distribution of handbills relating to the Vietnam war.[1] In response to the argument that "since the Center is open to the public, the private

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> expression on the basis of the content of that expression. [Citations omitted.] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." [Citations omitted.] It conversely follows, therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.

424 U.S. at 520-21 (emphasis in original).

1. Justice Powell, writing for the Court in Lloyd, tried to distinguish Logan Valley and Marsh from Lloyd. In Hudgens, Powell conceded that he could not do so:

> I now agree with Mr. Justice Black that the opinions in these cases [Logan Valley and Marsh] cannot be harmonized in a principled way. Upon more mature thought, I have concluded that we would have been wiser in Lloyd Corp. to have confronted this disharmony rather than draw distinctions based upon rather attenuated factual differences.

424 U.S. at 523-24 (Powell, J., concurring).

owner cannot enforce a restriction against handbilling on the premises," the Lloyd Court stated: "Respondent's argument, even if otherwise meritorious, misapprehends the scope of the invitation extended to the public. . . . There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." 407 U.S. at 564-65. The Court went on to note that it

> [had] never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.

Id. at 568.[1]

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1. In reaching its decision, the Lloyd Court made passing reference to the less drastic alternative doctrine. The persons distributing the antiwar material in Lloyd had moved to the public sidewalks after being asked to leave the shopping center. Thus,

> [i]t would be an unwarranted infringement of property rights to require [the owners of the property] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accomodation would diminish property rights without significantly enhancing the asserted right of free speech.

Id. at 567.

The foregoing cases illustrate that, generally speaking, the private owner of property has an inherent right to control its use. When government seeks to limit those rights, it must do so within bounds staked out by the Constitution. It must not trespass on the personal or property rights of private owners who may, within limits, establish associational restrictions against the outside world. This theme clearly emerges even from modern fourth amendment, civil rights, and personal appearance cases.

Search and seizure cases.--The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Absent "exigent" circumstances,[1] the government must obtain a search warrant before it may conduct a search of a person, his personal effects, or his home or place of business.

Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (U.S. May 23, 1978), held that a commercial establishment did not have to permit a warrantless inspector from the Occupational Safety and Health Administration to enter its premises.

> Without a warrant he [the OSHA inspector] stands in no better position than a member of the public. . . .

1. For a discussion of what constitutes exigent circumstances, see G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); Roaden v. Kentucky, 413 U.S. 496 (1973).

> The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

46 U.S.L.W. at 4485 (footnotes omitted). In most states, warrantless searches may be conducted by the owners of even monopoly use commercial property. Airline searches provide examples.

> Where the search is made at the behest of or with the assistance of law enforcement officers, there must be probable cause, and in appropriate instances an authorizing warrant, if the search is to pass constitutional muster. But where the search is made on the carrier's own initiative for its own purposes, Fourth Amendment protections do not obtain for the reason that only the activities of individuals or non-governmental entities are involved.

United States v. Pryba, 502 F.2d 391, 398 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975).[1]

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1. See also United States v. DeBerry, 487 F.2d 448, 450 (2d Cir. 1973); United States v. Valen, 479 F.2d 467, 469-70 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); United States v. Blanton, 479 F.2d 327 (5th Cir. 1973); United States v. Echols, 477 F.2d 37 (8th Cir.), cert. denied, 414 U.S. 825 (1973); United States v. Tripp, 468 F.2d 569 (9th Cir. 1972), cert. denied, 410 U.S. 910 (1973); United States v. Harding, 475 F.2d 480, 483-84 (10th Cir.), vacated

After notice, a warrantless airport search by the government has been held reasonable. In United States v. Edwards, 498 F.2d 496, 501 (2d Cir. 1974), signs at the airport stated: "PASSENGERS AND BAGGAGE SUBJECT TO SEARCH." A loudspeaker warned "passengers" that their baggage would be searched. The court stated:

> The point is rather that in order to bring itself within the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search, that he is at liberty to proceed no further.

This principle is applicable to common carriers of electronic communications. Although wiretaps are closely regulated by federal statutes, it is "well established" that a telephone company can monitor its own lines to the extent reasonably necessary to protect its property from fraud.[1]

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on other grounds, 414 U.S. 964 (1973); United States v. Cangiano, 464 F.2d 320, 324-25 (2d Cir. 1972), vacated on other grounds, 413 U.S. 913 (1973). But see United States v. Fannon, 556 F.2d 961, 965 (9th Cir. 1977) ("Congress supplanted whatever common law power of search air carriers may have had and subjected such searches to the Fourth Amendment's standard of reasonableness"); United States v. Davis, 482 F.2d 893, 904 (9th Cir. 1973) ("It makes no difference that the act of opening appellant's briefcase was accomplished by a 'private' airline employee rather than a 'public' official. The search was part of the overall, nationwide anti-hijacking effort, and constituted 'state action' for the purposes of the Fourth Amendment.").

1. Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 et seq., established detailed

See, e.g., United States v. Goldstein, 532 F.2d 1305 (9th Cir.), cert. denied, 429 U.S. 960 (1976).

Trespass.--Ordinarily the owner of a private business located on private property can exclude anyone without cause. See, e.g., Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124 (D. Md.), aff'd, 284 F.2d 746 (4th Cir. 1960); Nash v. Air Terminal Services, 85 F. Supp. 545 (E.D. Va. 1949).

In Washington, Alexandria & Georgetown Railroad v. Brown, 84 U.S. (17 Wall.) 445 (1873), the Supreme Court upheld the government's right to condition entry onto its land with a requirement of non-discrimination. In that case, it also recognized the private property owner's right

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rules for interception of wire communications and prohibits most electronic eavesdropping by governmental officials. An exception is provided for communications common carriers.

> It shall not be unlawful . . . for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication . . . .

18 U.S.C. § 2511(2)(a)(i). See also United States v. Clegg, 509 F.2d 605 (5th Cir. 1975), and cases cited in note 6 of the court's opinion.

to determine with whom it was willing to have its invitees associate.

> Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road in the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality . . . . It was the privilege of the company to reject it, but to do this, it must reject the whole legislation with which it was connected.

Id. at 453. Thus, twenty-three years prior to the court-sanctioned formalization of the separate but equal doctrine in Plessy v. Ferguson, 163 U.S. 537 (1896), the owner of monopoly use commercial property was allowed to determine who could come through its doors.

Trespass laws have been upheld against constitutional attacks based on the first amendment, due process, and interstate commerce clauses of the Constitution. See, e.g., Breard v. Alexandria, 341 U.S. 622 (1951). "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses." 341 U.S. at 642. See also Rosado Maysonet v. Solis, 409 F. Supp. 576 (D. Puerto Rico 1975) (casino may eject patron who acts in unruly manner and fails to comply with regulations); Bonomo v. Louisiana Downs, Inc., 337 So. 2d 553 (La. App. 1976) (race track may bar convicted bookmakers).

Martin v. Struthers, 319 U.S. 141 (1943), struck down an ordinance which prohibited any person from knocking on doors to communicate ideas or to sell products to the inhabitants. However, the Court noted that what the municipality could not do, the individual inhabitants of residences could do by enforcement of the trespass laws. Thus, the householder may determine whom he will and whom he will not see.[1]

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1. Balanced against the property owner's rights is the state's police power. Courts often hold that the state has the inherent power to require private property owners to allow public officials access to property in order to perform tasks necessary for the health and safety of citizens. This government right is not unqualified. Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (U.S. May 23, 1978) (the OSHA search case). For previous rulings see, e.g., Downs v. United States, 522 F.2d 990, 1003 (6th Cir. 1975); Schindelar v. Michaud, 411 F.2d 80, 82-83 (10th Cir. 1969); Taylor v. Fine, 115 F. Supp. 68 (S.D. Calif. 1953). The Restatement (Second), Torts § 211 also recognizes this privilege:

> A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled.

However, an illegal entry by police officers may establish a prima facie case of trespass. Norton v. Turner, 427 F. Supp. 138, 144 n.5 (E.D. Va. 1977).

Also of note is the Civil Aeronautics Act, 49 U.S.C. §§ 1301 et seq., which granted a "public right of freedom

Hair and dress codes.--Existing with and a part of the right of property owners to control the use of their property, is the right of an employer to establish dress and grooming codes for his employees.[1] As the court stated

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of transit through the navigable airspace of the United States." Id. § 1304. This statute changed the common law rule of cojus est solum, ejus est usque ad coleum et ad inferos (whose is the soil, has it unto the sky and the depths). The Supreme Court upheld the Act as a proper exercise by Congress of the power granted by the commerce clause. United States v. Causby, 328 U.S. 256 (1946); see, e.g., Harvey, Landowners' Rights in the Air Age: The Airport Dilemma, 56 Mich. L. Rev. 1313 (1958); Note, 74 Harv. L. Rev. 1581 (1961).

The police power is also used to curtail individual freedom. For example, state laws may require motorcycle riders to wear helmets. See, e.g., State v. Cotton, 55 Hawaii 138, 516 P.2d 709 (1973); American Motorcycle Association v. Department of State Police, 11 Mich. App. 351, 158 N.W.2d 72 (1968) (unconstitutional), overruled, City of Adrian v. Poucher, 67 Mich. App. 133, 240 N.W.2d 298, aff'd, 398 Mich. 316, 247 N.W.2d 798 (1976). But see People v. Fires, 42 Ill. 2d 446, 250 N.E.2d 149 (1969) (unconstitutional). States also may require that life preservers be carried on boats. See, e.g., People v. Roe, 48 Ill. 2d 380, 270 N.E.2d 27 (1971). Likewise, owners of optional use commercial property may require users to wear fireproof clothing and helmets. For example, owners of automobile race courses require drivers to wear protective clothing and helmets and owners of horse race courses require jockeys to wear protective headgear.

1. Unlike private employers, the government must have some rational basis for enacting grooming regulations for its employees. However, Kelley v. Johnson, 425 U.S. 238 (1976), indicates that the burden is on the employee who challenges the regulation to prove that there is no rational basis for it.

> The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniform

in regard to a privately owned transit system:

> Of course individual citizens have a constitutional right to wear beards, sideburns and mustaches in any form and to any length they may choose. But that is not a right protected by the Federal Government, by statute or otherwise, in a situation where a private employer has prescribed regulations governing the grooming of its employees while in that employer's service. The wearing of a uniform, the type of uniform, the requirement of hirsute conformity applicable to whites and blacks alike, are simply non-discriminatory conditions of employment falling within the ambit of managerial decision to promote the best interests of its business.

Brown v. D.C. Transit System, Inc., 523 F.2d 725, 728 (D.C.

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> police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power. . . . Having recognized in other contexts the wide latitude accorded the Government in the "dispatch of its own internal affairs," . . . we think Suffolk County's police regulations involved here are entitled to similar weight. Thus the question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property.

425 U.S. at 247 (citations omitted).

Cir.) cert. denied, 423 U.S. 862 (1975). See also Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Knott v. Missouri Pacific Railroad, 527 F.2d 1249 (8th Cir. 1975); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

Public conduct on optional use commercial property is no less subject to the private property owner's control.

The Supreme Court has upheld the right of private property holders to exclude warrantless Department of Labor officials who sought to inspect for violations of the Occupational Safety and Health Act of 1970. Marshall v. Barlow's, Inc., supra. Section 8(a) of the Act, 29 U.S.C. § 657(a), authorized reasonable inspections at reasonable times. The Court held that "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." Id. at 4484.[1]

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1. In Barlow's, the Court relied upon See v. City of Seattle, 387 U.S. 541, 543 (1967), which ruled that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

Civil rights laws.--The Civil Rights Act of 1964 and its subsequent amendments significantly infringe the individual's control over his property. The Fair Housing Act, 42 U.S.C. §§ 3601 et seq., makes it unlawful to discriminate on the basis of race, color, religion, sex, or national origin in the sale or rental of housing. The Act does not prohibit discrimination in the sale or rental of single-family houses if sold or rented without the use of a real estate broker or agent and without "publication, posting or mailing" of any advertisement or notice in violation of the Act. 42 U.S.C. § 3603(b).

In United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973), the Fifth Circuit upheld the Fair Housing Act as within Congress' constitutional authority under the thirteenth amendment. Id. at 117. The court relied on the following language from the Supreme Court's decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968):

> Thus, the fact that [42 U.S.C.] § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of

> Congress simply because it reaches beyond state action to regulate the conduct of private individuals. . . .
>
> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." . . . Whether or not the Amendment itself did any more than that--a question not involved in this case--it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."

392 U.S. at 438-39 (emphasis added; citations and footnotes omitted). But cf. Moose Lodge No. 107 v. Irvis, supra. Thus, absent a valid constitutional basis, such as the commerce clause or the equality amendments, neither Congress nor the states may infringe upon the fundamental associational rights of the owners of private property. A mass movement which breached private property associational rights "necessitated the passage of the Civil Rights Act of 1964." Drew v. United States, 292 A.2d 164 (D.C. Ct. App.), cert. denied, 409 U.S. 1062 (1972).

In interpreting the fair housing laws, the courts have restrained efforts to eliminate racial discrimination. Metropolitan Housing Development Corp. v. Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 97 S. Ct. 752 (1978) states:

> The courts ought to be more reluctant to grant relief when the [private] plaintiff seeks to compel the [government] defendant to construct integrated housing or take

> affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction. To require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy.

Id. at 1293 (emphasis added).

Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq. prohibits discrimination in public accomodations on the basis of race, color, religion, or national origin.[1] To that extent the statute limits the private property owner's right of association. It does not, however, prevent the owner of a restaurant from excluding persons without shoes, Feldt v. Marriott Corp., 322 A.2d 913 (D.C. Ct. App. 1974), or the owner of a bar from excluding unescorted women, DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968), or the owner of a hotel from excluding women suspected of prostitution, Kelly v. United States, 348 A.2d 884 (D.C. Ct. App. 1975), or the manager of a restaurant from excluding a patron who conducts himself in a proper manner but who is on the owner's list of "undesirables." Drew v. United States, supra. See

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1. Title II does not prohibit discrimination based on sex.

also Terry v. Swald, 73 N.Y.S.2d 399, 190 Misc. 239 (Utica City Ct. 1947) (railroad may prohibit certain taxicab companies from soliciting at its station). The Feldt court set out the applicable principles:

> At common law a restaurant owner had the right to arbitrarily refuse service to any guest. Absent constitutional or statutory rights, the common law still controls in this jurisdiction. This is not a case of racial discrimination or violation of civil rights. We do have a statute making it unlawful for a restaurant to refuse service to "any quiet and orderly person" or to exclude any one on account of race or color; but, as we have said, there was no racial discrimination here and we do not think the requirement to serve any quiet or orderly person prevents a restaurant from having reasonable requirements as to the dress of its customers, such as a requirement that all male customers wear coats and ties or, as here, that all customers wear shoes. . . .

322 A.2d at 915 (footnotes omitted). The Fifth Circuit has upheld the same principle.

> If a person came into a restaurant or any other place covered by Title II and began to do something other than that which Title II gave him the right to do--to be served, the owner of the restaurant could ask him to leave and Title II would be no defense against any action against him, including an action in trespass.

Walker v. Georgia, 417 F.2d 1, 4 (5th Cir. 1969).

The owner of optional use commercial property can exclude those who object to smoking. With notice to them,

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the conflict between health based anti-public smoking statutes and the constitutionally protected property and associational rights can be avoided. A sign is the "less drastic alternative."

Discrimination by private individuals.--The government may not prohibit even racial discrimination by private individuals acting in a purely private capacity. Although cases such as Shelley v. Kraemer, 334 U.S. 1 (1948), have held that the state may not enforce racially restrictive covenants, the courts and Congress have stopped short of holding that individuals could not enter into and abide by such agreements.[1]

> Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.
>
> We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their

1. Even the Fair Housing Act does not cover sales or rentals of single-family homes by private individuals who act alone, who do not advertise, and who otherwise conform to the limitations of 42 U.S.C. § 3603.

> terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

334 U.S. at 13. This was reiterated in 1972. Moose Lodge No. 107 v. Irvis, supra. The question was whether the refusal by a private club to serve a black person was made state action by virtue of the club's possession of a state liquor license. The Court held that it was not.

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases . . . and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

407 U.S. at 173. See also Golden v. Biscayne Bay Yacht Club, supra.

In Evans v. Abney, 396 U.S. 435 (1970), the Court refused to order that property left to the city for use as an all-white park remain with the city even though the will had failed (due to the Court's prior decision that the park could not be

operated on a racially discriminatory basis).[1] The Court, understanding that the closing of the park would injure blacks as well as whites, upheld the reversion of the property to the heirs of the donor on the ground that the racially discriminatory motivation of the private property owners did not violate the fourteenth amendment.

> A second argument . . . stresses the similarities between this case and the case in which a city holds . . . title to a public park and then closes that park . . . to avoid . . . a prior court order directing that the park be integrated as the Fourteenth Amendment commands. . . . [A]ssuming arguendo that the closing . . . would . . . violate the Equal Protection Clause, that case would be clearly distinguishable . . . because there it is the State and not a private party which is injecting the racially discriminatory motivation.

396 U.S. at 445 (emphasis added).

Property rights of government owners.--As indicated in Lloyd v. Tanner, supra, even the government may restrict or prohibit the exercise of first amendment rights on its property which is not generally open to the public. In Adderley v. Florida, 385 U.S. 39 (1966), the Court upheld the trespass

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1. Evans v. Newton, 382 U.S. 296 (1966). Following this decision the Supreme Court of Georgia ruled that the trust established in the will had failed and that the property reverted by operation of Georgia law to the heirs of the testator. 224 Ga. 826, 165 S.E.2d 160 (1968), aff'd, 396 U.S. 435 (1970).

convictions of protestors who refused to leave a jail after being asked to do so by the jail official.[1]

In McMichael v. United States, 355 F.2d 283 (9th Cir. 1965), and United States v. Hymans, 463 F.2d 615 (10th Cir. 1972), the courts upheld regulations issued under 16 U.S.C. § 551, which delegated to the Secretary of Agriculture (rather than Interior) authority to make rules and regulations concerning the "occupancy and use" of national forests.

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1.

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate * * *" Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana, [379 U.S. 536 (1965), 379 U.S. 559 (1965)]. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

385 U.S. at 47-48.

In the two Cox v. Louisiana cases, 379 U.S. 559 (1965), 379 U.S. 536 (1965), the Court made clear that the

The regulation in McMichael prohibited the operation of motorized vehicles in certain parts of Boise National Forest. The regulation in Hymans prohibited "indecent conduct" in certain areas of the White River National Forest. Implicit in McMichael and Hymans is the conclusion that article IV, section 3 of the Constitution allows the regulation by Congress of private conduct on public property even if that conduct affects only the sensibilities of others who use it. But see Cohen v. California, 403 U.S. 15 (1971), in which the right of idiomatic expression was provided greater protection than were the sensibilities of bystanders. See also Lewis v. City of New Orleans, 415 U.S. 130 (1974); Brown v. Oklahoma, 408 U.S. 914 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563 (1977).

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government has the power to regulate the use of public property as long as such regulations do not unreasonably interfere with the constitutional rights of citizens who wish to make use of the property.

> There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy.

379 U.S. at 562.

Like private property owners, the government may, in some instances, set conditions for entry onto its property. Prison officials may require visitors to submit to a warrantless personal search if that is necessary to render the facility secure. Black v. Amico, 387 F. Supp. 88 (W.D. N.Y. 1974), indicated that in certain circumstances, even a strip search could be justified. Prison employees may also be subject to warrantless search. State v. Paruszewski, 11 Ariz. App. 568, 466 P.2d 787, 789 (1970), held:

> The essential maintenance and purpose of a penitentiary is directed at achieving a level of internal physical security so as to effect its various functions. Basic to the maintenance of this physical security is the requirement that weapons and drugs be kept out. We believe this security can only be achieved by enforcing continuous checks on all persons and places within the prison walls, including employees.

See also Gettleman v. Werner, 377 F. Supp. 445 (W.D. Pa. 1974). Although prisoners have fourth amendment rights, see Bonner v. Coughlin, 517 F.2d 1311 (5th Cir. 1975); Annot., 32 A.L.R. Fed. 601 (1977), they may be required to undergo warrantless body searches when necessary for maintenance of prison security. Hodges v. Klein, 412 F. Supp. 896 (D.N.J. 1976).

The military can require a warrantless search as a condition to entry onto its property. In United States v. Vaughan, 475 F.2d 1262, 1264 (10th Cir. 1973), and United States v.

Mathews, 431 F. Supp. 70, 72-73 (W.D. Okla. 1976), notice in the form of subject-to-search warning signs posted at the entrances was significant, see also United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975), and as trial and appellate lawyers well know, entry into federal courthouses may be conditioned upon the search of brief cases and packages. Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972).

## Conclusion

Unless prohibited by the Constitution, or a constitutionally valid statute, the owner of private property can determine its use. The range of commercial activities permissible is not limited to that which is inherently safe, or innocuous, or which meets with approval by the majority. "Foolish," "bad," and "annoying" as well as "safe," "good," and "pleasing" activities are permissible if lawful. Because cigarettes are lawful articles of commerce, the owners of residential private property and, with notice, optional use commercial property, and, perhaps, even monopoly use commercial property may determine whether or not smoking will be allowed, and, if allowed, the conditions of non-smoker entry.

Without litigation establishing this right of private commercial association and attacking the constitutionality of governmentally imposed anti-smoking legislation, ashtrays will soon be as rare as cuspidors.

## CHAPTER III

## NOTICE AS A LESS DRASTIC ALTERNATIVE

There has existed for many years a principle of law which holds that when the government (federal or state) has available a variety of equally effective means by which to achieve a predetermined end, it must choose the measure which least interferes with individual liberties. This doctrine has been termed variously the "less drastic means,"[1] the "reasonable alternative,"[2] the "less intrusive alternative,"[3] "precision of regulation,"[4] and

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1. E.g., United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

> Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the vitality of First Amendment freedoms.

389 U.S. at 267-68.

2. Wormuth & Mirkin, The Doctrine of The Reasonable Alternative, 9 Utah L. Rev. 254 (1964) [hereinafter cited as Wormuth].

3. Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1082-93 (1968).

4. E.g., NAACP v. Button, 371 U.S. 415 (1963).

> Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

371 U.S. at 438 (citations omitted).

"necessity."[1] For purposes of this paper, the doctrine shall be called "the less drastic alternative" or simply "the doctrine."

While the doctrine has played a significant role in constitutional adjudication since the early part of this century, it has received scant scholarly attention. See Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964) [hereinafter Wormuth]; Struve, The Less-Restrictive Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967) [hereinafter Struve]; Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria, 27 Vand. L. Rev. 971 (1974) [hereinafter Note]; Note, Less Drastic Means and the First Amendment, 78 Yale

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1. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

> In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest." . . .
>
> . . . Statutes affecting constitutional rights must be drawn with "precision," . . . and must be "tailored" to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

405 U.S. at 342-43 (citations omitted).

L.J. 464 (1969) [hereinafter Yale Note]. See also Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 Mich. L. Rev. 1107 (1972); Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048 (1968). Jeremy Bentham had the seeds of the doctrine when he wrote:

> It is plain, therefore, that in the following cases punishment ought not to be inflicted.
>
> 1. Where it is groundless: where there is no mischief for it to prevent; the act not being mischievous upon the whole.
>
> 2. Where it must be inefficacious: where it cannot act so as to prevent the mischief.
>
> 3. Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented.
>
> 4. Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.

J. Bentham, An Introduction to the Principles of Morals and Legislation 171 (Hafner ed. 1961). (Had the courts employed Bentham's language (used in items three and four above), the doctrine might be better understood as the theory of "greater mischief" or the rule of the "cheaper rate.")

The doctrine first appeared in Supreme Court adjudication in 1821, in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), in which the Court limited the

contempt power of Congress to "the least possible power adequate to the end proposed." Id. at 230-31. The most complete discussion of the doctrine is that of Mr. Justice Frankfurter, dissenting in Shelton v. Tucker, 364 U.S. 479 (1960):

> Whenever the reasonableness and fairness of a measure are at issue--as they are in every case in which this Court must apply the standards of reason and fairness, with the appropriate scope to be given those concepts, in enforcing the Due Process Clause of the Fourteenth Amendment as a limitation upon state action--the availability or unavailability of alternative methods of proceeding is germane. . . . [T]he consideration of feasible alternative modes of regulation [does] not imply that the Court might substitute its own choice among alternatives for that of a state legislature, or that the States were to be restricted to the "narrowest" workable means of accomplishing an end. . . . Consideration of alternatives may focus the precise exercise of state legislative authority which is tested in this Court by the standard of reasonableness, but it does not alter or displace that standard. The issue remains whether, in the light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.

Id. at 493-94 (Frankfurter, J., dissenting) (citation omitted).

Since its first appearance in Anderson v. Dunn, supra,

the doctrine has been woven into judicial fabric. Although out of style, perhaps finally, in the area of economic or "substantive" due process, it adorns (and often determines) the outcome of first amendment, equal protection, and procedural due process cases.

Historically, the Supreme Court has used the doctrine to decide cases under the due process, equal protection, and commerce clauses, and the first amendment.[1] Recently, it has been revived in the area of substantive due process and "penumbral" rights. It also is used in state court due process determinations.[2]

A misconception, apparently popular, is that the doctrine of the less drastic alternative is applicable only to

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1. Although first amendment and equal protection cases, as well as others involving fundamental rights, are traditional areas in which the doctrine has been applied, they will not be discussed in detail in this paper. For citations and analysis, the reader is referred to Richardson v. Ramirez, 418 U.S. 24, 77-80 (1974) (Marshall, J., dissenting); American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Note, supra at 995-1015; Wormuth, supra at 267-93; Yale Note, supra. The doctrine also is employed in other countries. See Struve 1464 n.10 (West Germany and Switzerland).

2. See, e.g., Schroeder v. Binks, 415 Ill. 192, 113 N.E. 2d 169 (1953); Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281 (1965); Trio Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957); State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Livesay v. Tennessee Bd. of Exam. in Watchmaking, 204 Tenn. 500, 322 S.W.2d 209 (1959); Struve, supra at 1464 & n.7; Note, supra at 981 & nn.49-51.

cases involving first amendment or other "fundamental" rights. This is not now, nor has it ever been, the case. Although the first amendment does provide a primary area for use of the doctrine, it is not its exclusive preserve.

Economic Due Process

The doctrine has been applied under the due process clause to prevent the banning of a business or product if the evils associated with such business or product could be eliminated by regulation.[1] Beginning in the late

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1. The economic due process cases were exceptions to the general rule which Wormuth characterizes as follows:

> The Court has repeatedly held that in the cases of potentially harmful articles the legislature may reject inspection and rely on total prohibition; in the case of harmless articles, these too may be prohibited if this will facilitate the control of harmful articles which might be sold under the guise of the harmless; practices and activities may also be prohibited, even when innocent, in order to prevent them from working injury in settings in which this may occur.

Wormuth, supra at 260. This position was illustrated by the first Mr. Justice Harlan:

> If, looking at all circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

Booth v. Illinois, 184 U.S. 425, 429 (1902).

This was stated differently by Justice Hughes:

nineteenth century and continuing actively through the 1930's, the Supreme Court held legislation unconstitutional because it infringed upon some notion of "liberty" or "property" protected by the due process clause.

Although most legislation invalidated under the doctrine was economic, there were exceptions. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down state legislation which required parents to send their children to public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (a state cannot prohibit the study of foreign language in public schools). Despite these exceptions, most invalidated legislation related to and, in the Court's opinion, conflicted with free enterprise values. See Wormuth, supra at 260-67; Note, supra 974-80.

Previously, the doctrine had been vigorously supported in the dissents of Mr. Justice Field. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87 (1873).

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> Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Chicago, B.&Q.R.R. v. McGuire, 219 U.S. 549, 569 (1911).

Field argued that granting a monopoly to a slaughterhouse could not be justified on the grounds of promoting sanitation because inspection and zoning requirements already implemented accomplished the state's purposes. The majority deferred to the legislature. See Note, supra at 974-75.

An early case applying the principles of the doctrine to state legislation was Lawton v. Steele, 152 U.S. 133 (1894), which upheld a state statute forbidding net fishing.

> To justify the State in thus interposing its authority on behalf of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not . . . impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Id. at 137.

The most famous substantive due process decision invalidated a statute limiting bakery employees' working hours to 60 per week and ten per day. Lochner v. New York, 198 U.S. 45 (1905). The statute interfered with the employer's freedom to contract with his employees, a right which the Court held to be "part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution." Id. at 53. Implicit in Lochner was the assumption that the

desired ends could be achieved by another less drastic means. See id. at 54-55.

Adams v. Tanner, 244 U.S. 590 (1917), overturned a law which "unduly restrict[ed] the liberty . . . guaranteed by the 14th Amendment, to engage in a useful business." Id. at 597 (emphasis added). Although "abuses may, and probably do, grow up in connection with this business [employment agencies]," and this "is adequate reason for hedging it about by proper regulations," such abuses were "not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." Id. at 594.

Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926), struck down a statute which prohibited the use of "shoddy" in the manufacture of "comfortables."[1] The state, while insisting that the legislation was necessary for the protection of the health of its citizens, conceded at trial that "shoddy" could be "rendered perfectly harmless by sterilization." Id. at 411. The Court held that in the face of available alternatives--regulations regarding sterilization and labeling--the state could not prohibit the use of "shoddy."

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1. "Shoddy" was any material which had been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up, or ground up. A "comfortable" was any cover, quilt, or quilted article made of cotton or other textile material and stuffed or filled with fiber, cotton, wool, hair, jute, feathers, feather down, kapok, or other soft material.

Tyson & Bro. v. Banton, 273 U.S. 418 (1927), invalidated a statute which forbade the resale of theater tickets at a price more than fifty cents higher than that advertised.

> The evil of collusive alliances between the proprietors of theatres and ticket brokers or scalpers seems to have been effectively dealt with in Illinois by an ordinance which required (1) that the price of every theatre ticket shall be printed on its face and (2) that no proprietor, employee, etc., of a theatre shall receive or enter into any arrangement or agreement to receive more.

Id. at 443-44. That same year, the Court struck down a state law which forbade purchases of milk, cream, or butter fat at a higher price in one location than in another. Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927). Justice McReynolds wrote:

> .The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit . . . business [being carried on] in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer.

Id. at 9.

During the New Deal, the Court shed the doctrine, see, e.g., Carolene Products Co. v. United States, 323 U.S. 18 (1944); Olsen v. Nebraska ex rel. Western Reference & Bond Association Inc., 313 U.S. 236 (1941); United States v. Carolene Products Co., 304 U.S. 144 (1938); Note, supra at 977-78, but it was not until Ferguson v. Skrupa, 372 U.S. 726 (1963),

that the Court formally abandoned it by overruling Adams v. Tanner, supra (the 1917 employment agency case).

In Ferguson, a three-judge district court invalidated a Kansas statute which prohibited the business of debt adjustment except as an incident of the practice of law. Mr. Justice Black wrote:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . [T]his Court does not sit to "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."
>
> We refuse to sit as a "super-legislature to weigh the wisdom of legislation," . . . and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

372 U.S. at 730-32 (citations and footnotes omitted).

The doctrine's obituary was premature. Only two years later, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court revitalized it in a "penumbral" area.

The "New" Substantive Due Process

Mr. Justice Holmes, with Mr. Justice Brandeis, was a principal critic of the less drastic alternative doctrine as it applied to economic legislation. Holmes used it when individual liberties were involved. As then Professor Frankfurter observed:

> Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements. These enduring liberties of the subject, in the noble English phrase, were, so far as the national government is concerned, specifically enshrined in the Bill of Rights. . . . Because these civil liberties were explicitly safeguarded in the Constitution, or conceived to be basic to any notion of the liberty guaranteed by the Fourteenth Amendment, Mr. Justice Holmes was far more ready to find legislative invasion in this field than in the areas of debatable economic reform.

F. Frankfurter, Mr. Justice Holmes and the Supreme Court 76 (1938).

As a Supreme Court Justice, Mr. Frankfurter would deny that the Constitution gives the Supreme Court "greater veto power when dealing with one phase of 'liberty' than with another," West Virginia Board of Education v. Barnette, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting), or that any one constitutional liberty occupies a "preferred position." Kovacs v. Cooper, 336 U.S. 77, 93 (1949). Holmes' view, not Frankfurter's, prevailed.

As early as Guinn v. United States, 238 U.S. 347 (1915), which struck down the "grandfather clauses" used to disfranchise blacks, the Court observed that a more stringent standard should be applied "on a subject . . . involving the establishment of a right whose exercise lies at the very basis of government." Id. at 366.

The New Deal Court left room for the operation of the doctrine (and for the rise of the compelling governmental interest test) when individual liberties were at issue. In United States v. Carolene Products Co., supra, Chief Justice Stone distinguished infringements upon the Bill of Rights:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Id. at 152 n.4.

In Griswold, Mr. Justice Douglas, writing for the plurality, cloned a right of privacy by breeding "penumbras" and "emanations" drawn from the Bill of Rights. Avoiding Lochner and its interpretation of "liberty" (which included liberty of contracts and less drastic alternative standards when

attacking economic legislation), Douglas wrote:

> [F]oregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.
> . . . .
> We have had many controversies over these penumbral rights of "privacy and repose." . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

381 U.S. at 484-85 (citations omitted). Thus, theory became law and "the right of privacy" was born. To breathe life into it, Douglas wrote of overbreadth:

> [A] law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Id. at 485.

Although Mr. Justice Douglas did not invoke the due process clause (indeed, he desperately tried to avoid it), a clear majority of the Court--five justices who concurred (Goldberg, Warren, Brennan, Harlan, and White) and two who dissented (Black and Stewart)--thought that "due process" was implicated in some way.[1]

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1. 381 U.S. at 486-99 (Goldberg, Warren, Brennan, JJ., concurring); id. at 499-502 (Harlan, J., concurring); id. at 502-07 (White, J., concurring); id. at 507-31 (Black, Stewart, JJ., dissenting); see Note, supra at 981 & n.59.

The abortion decisions, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), easily descended from Griswold, which struck down Connecticut's anti-contraceptives statute. Roe and Doe made it clear that the right of privacy (and others[1]) derives substantive (and substantial) protection from the fourteenth amendment's "liberty" clause. One student has noted, "Even Justice Rehnquist has agreed that fourteenth amendment liberty 'embraces more than the rights found in the Bill of Rights.'" Note, supra at 981 n.62, citing Roe v. Wade, 410 U.S. at 172-73 (Rehnquist, J., dissenting); see Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (right to travel); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (right of association); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (right of law school graduate to engage in the practice of law); Pierce v. Society of Sisters, 268 U.S. at 534-35 (right to send children to a private school).

Thus, while the less drastic alternative test is no longer given when "purely" economic rights are examined (but see Vlandis v. Kline, 412 U.S. 441, 460-61 (1973) (Burger, J., dissenting)), when the Court passes on "fundamental" rights, the doctrine plays a significant role.

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1. Even corporate first amendment rights are encompassed within the fourteenth amendment's protection of liberty. See First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978).

Procedural Due Process

The doctrine of the less drastic alternative has been continually viable in procedural due process cases since Lawton v. Steele, supra, which upheld a statute permitting destruction of illegally used fishing nets.

Mr. Justice Frankfurter, concurring in Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951), provided a classic statement of the concerns which must be considered when determining how much "process" is due:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the considerations that must enter into the judicial judgment.

Id. at 163 (emphasis added).

Recent procedural due process cases have employed the less drastic alternative test to strike down conclusive presumptions. See, e.g., Cleveland Board of Education v. LeFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Bell v. Burson, 402 U.S. 535 (1971).

Vlandis invalidated a Connecticut statute which established a residency requirement for the payment of in-state university tuition. All students who were non-residents of Connecticut when they applied for admission were barred from ever gaining resident status while they remained students.

The Court noted that "there [were] other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451. The Court concluded that a permanent and irrebuttable presumption could not be used when it is "not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." Id. at 452.

This application of the doctrine sparked the vigorous dissent of Chief Justice Burger. The Court's "function in constitutional adjudication," Burger argued, "is not to see whether there is some conceivably 'less restrictive' alternative to the statutory classifications under review." 412 U.S. at 460. The doctrine, Burger contended unsuccessfully, applied to cases involving the "strict scrutiny" test, not to due process cases. Id. at 460-61.

> Distressingly, the Court applies "strict scrutiny" and invalidates Connecticut's statutory scheme without explaining why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny. The real issue here is not whether holes can be picked in the Connecticut scheme; of course, that is readily done with this "bad" statute. Whether we deal with statutes of Connecticut or of Congress, we can find flaws, gaps, and hard and unseemly results at times. But our function in constitutional adjudication is not to see whether there is some conceivably "less restrictive" alternative to the statutory classifications under review. The Court's task is to explain why the "strict scrutiny" test, previously confined to other

> areas, should now in practical effect be read into the Due Process Clause. The drift of Stanley v. Illinois, 405 U.S. 645 (1972), on which the Court relies heavily, was to apply a similar test, but at least there the Court essayed to explain that the rights of fatherhood and family were regarded as "'essential'" and "'basic civil rights of man,'" id., at 651, and to provide an analytic basis for the result reached. To the same effect was Bell v. Burson, 402 U.S. 535 (1971), where the Court noted that suspension of a driver's license might impair the pursuit of a livelihood, thereby infringing "important interests of the licensees." Id., at 539.

412 U.S. at 460-61. In a lone footnote, Chief Justice Burger wrote:

> Implicit in my dissenting vote, of course, is my disagreement with MR. JUSTICE WHITE'S suggestion that the "weight and value" of the appellees' interest in obtaining a higher education require us to pay something less than the usual deference to the judgment of the Connecticut Legislature. If appellees' chances of securing higher education were truly in jeopardy as a result of the tuition differential at issue here, there would at least be an arguable basis for special concern, though for me the San Antonio case would provide a serious obstacle to any departure from the traditional "rational basis" test. In this case, there is, in any event, no allegation by either appellee that the higher out-of-state tuition charge does, will, or even may deprive her of the opportunity to attend the University of Connecticut. Thus, try as I may, I find it impossible to understand why the interest of appellees at issue here amounts to any more or any less than the number of dollars they are required to pay in excess of Connecticut's in-state tuition rate. That amount may be "substantial," but the Court has never suggested that financial impact, per se, requires abandonment of the "rational basis" test of

> equal protection review . . . . Indeed, I had always thought that a simple financial deprivation was the classic case for judicial deference to legislative choices.

Id. at 461.

Conclusion

While the Lochner brand of economic substantive due process with its application of the less drastic alternative has been interred, at least aspects of it are regularly resurrected under one alias or another. They are available to attack anti-smoking ordinances, but the interest sought to be protected must be something definable as other than "purely economic." The interest need be only "important" (as opposed to "fundamental"). While many interests of the tobacco industry are definable as "only economic," others are more important. See, e.g., First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978) (corporate first amendment rights). The owners and lessees of optional use commercial property and the smokers who desire to purchase their goods and services are in different positions. Any attempt to statutorily restrict or prohibit entirely smoking on optional use commercial property (and perhaps even governmentally owned and monopoly use commercial property, see Chapter I and II, supra) infringes property owners' and smokers' associational rights.

"Property interests" transcend economics. Historically, the interests of property owners have been deemed basic in a free society. See Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); J. Adams, A Defense of the United States of America,

in F. Coker, Democracy, Liberty, and Property, 121-32 (1942); 1 W. Blackstone, Commentaries *138-40; J. Cribbet, Principles of the Law of Property 6-7 (1962); J. Locke, Of Civil Government 82-85 (1924). Proposed litigation must focus on the rights of the owner of real property and those who desire to assemble there. The presumption against courts and legislatures which attempt to classify citizens who seek to assemble is heavy. As one author has concluded:

> The primary consideration . . . is the nature of the issues presented. The Court can address that consideration from two interrelated perspectives. The issues can be viewed in terms of the importance of the individual interest at stake--their "fundamentality." "Fundamentality" is determined from guidance provided by the constitutional text, Anglo-American traditions, precedents of the Court, and to some degree, changing social conditions. If, in light of these criteria, the individual interest is ranked as fundamental, it is incumbent upon the Court to review legislative alternatives to afford the interest its due protection. The only state interest that should be balanced against the individual's is that marginal difference between the existing statute and the alternative. . . . Thus by considering alternatives, the Court affords the individual interest greater protection with the comforting realization that the state has other avenues open.
>
> There is a second view that the Court could adopt in determining the extent to which alternatives are relevant. This approach is basically a matter of role allocation. The Court would initially focus on whether the questions presented are best solved by the political process, or are appropriate for close review by an independent

> judiciary. To answer that, the Court must consider whether the case involves interests or minorities that are not properly protected by the whims and emotions of the majoritarian process. Legislators must react to the desires of their constituency, desires that are not always consistent with the Constitution. . . . The courts, however, are entrusted by society to sit independently of the political whirlwinds, and we have come to rely upon the courts to check the action of the legislatures in these instances. Certainly the constitutional text and tradition are important considerations here, but also of significance is the basic feeling that a political body cannot always be trusted to properly respect unpopular ideas and groups.

Note, supra at 1022-24.

Either the "fundamentality" of the interest or the "allocation of roles" can be used. If "fundamentality" is employed, then the nature of the right being infringed must be examined. If the challenging party is an owner of private property who has provided notice to the world of who is or is not welcome to assemble within his commercial establishment, then the words of Mr. Justice Stewart, in a plurality opinion, apply. To him, "the dichotomy between personal liberties and property rights is a false one." Lynch v. Household Finance Corp., supra, 405 U.S. at 552.

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the

> personal right in property. Neither could have meaning without the other.

405 U.S. at 552.

As Mr. Justice Stewart reiterated in a second plurality opinion: "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Fuentes v. Shevin, 407 U.S. at 81.[1] It should be noted that Justices Burger, Blackmun, and White dissented,[2] and that Justices Powell and Rehnquist took no part in either Lynch or Fuentes.

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1. Fuentes, although of recent vintage, has had an up-and-down history. Justice Stewart, who authored the plurality opinion in Fuentes, reported its demise in his dissent in Mitchell v. W.T. Grant Co., 416 U.S. 600, 629-36 (1974) (Stewart, J., dissenting), only to see it resurrected in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975) (Stewart, J., concurring). The Court in Di-Chem cited Fuentes for the following proposition: "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." 419 U.S. at 608.

2. The dissenting justices argued that (1) because state court proceedings were in progress, the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), applied and the federal courts should have stayed their actions pending the outcome of those actions; (2) in a replevin action and a subsequent challenge to the replevin statutes the Court should not "ignore . . . the creditor's interest in preventing further use and deterioration of the property in which he has a substantial interest [and which is] as deserving of protection as that of the debtor," 407 U.S. at 102; and (3) the Court's result "will have little impact and represents no more than ideological tinkering with state law." Id.

Role allocation primarily focuses upon the person whose rights are infringed. The right of privacy, if implicated by an anti-smoking ordinance, focuses upon the smoker and the property. This right is infringed, severely in some instances, when the government tries to tell the Does, Roes, and Moe Moscowitzes of the world that neither they nor their customers may smoke on what is undeniably their private property.

IV

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## CHAPTER IV

## IT PAYS TO ADVERTISE

In 1970, Congress made it unlawful "to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission" (the Commission). Pub. L. 91-222, § 2, 84 Stat. 89 (now 15 U.S.C. § 1335). In 1973, Congress included little cigars in the ban. 15 U.S.C. § 1335, as amended by Act of Sept. 21, 1973, Pub. L. 93-109, § 3, 87 Stat. 352. The statute was upheld against a broadcaster's first and fifth amendment based attack.[1] Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), aff'd mem., 405 U.S. 1000 (1972).

Prior to 1971, cigarette advertisements had been subjected to the fairness doctrine which required that broadcasters run a proportionate number of anti-smoking advertisements. These attacks apparently caused a decline in cigarette sales and in the number of smokers--trends which were reversed when the section 1335 prohibition was imposed in 1971.

In 1974 the Commission decided that the fairness doctrine was no longer applicable to product commercials.

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1. Circuit (now Chief) Judge Wright dissented, expressing concern over the exercise of governmental power to define which issues will be subject to public debate. 333 F. Supp. at 590, 592-93; see Comment, And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, 60 Calif. L. Rev. 1416, 1424 n.45 (1972). Capital Broadcasting is discussed more fully at pp. 148-54. See also Robinson v. American Broadcasting Cos., 328 F. Supp. 421 (E.D. Ky. 1970) (tobacco growers who sought injunction against anti-smoking commercials had vicarious

Today, the tobacco industry is constrained by the ban and beset by a campaign to place stringent limitations on public smoking. It is assaulted by anti-smoking advertisements which are sponsored by public-interest organizations. The preventive medicine agencies of the federal government seek to broaden and sharpen this attack. Included in their arsenal is television advertising. Anti-public smoking advertisements are probable because prohibition is preventive medicine's ultimate prescription.[1]

The appeal is aimed directly at democracy's ultimate legislature, the people. It will affect sales as well as

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unclean hands because of the health hazard of cigarettes and their advertisement on television by manufacturers).

1. For example, the Food and Drug Administration (FDA) and Federal Trade Commission (FTC) have agreed to coordinate their public relations responses

> to health crises . . . [and to] promote and participate in a workshop, tentatively planned by the FTC for June, on how the government should use or harness the public airwaves for dissemination of health information. According to an FTC staff member, it is at this meeting that the controversial issues associated with health promotion are expected to be raised. . . .

Uncle Sam Wants You To Be Healthy and Expensive, 200 Science 186 (1978).

Presently pending before the Federal Communications Commission is a request for reconsideration filed by 66 public-interest groups. They seek a requirement that radio and television stations be required to schedule a minimum of three public service announcements every two hours, including during the prime viewing and listening periods. The Department of Health, Education and Welfare (HEW) and FTC have joined them

votes and, sooner or later, the industry will be forced to consider a return to the broadcast media, principally television.

The industry may mount a legal attack on the constitutionality of the section 1335 prohibition on the grounds that it violates both the industry's "liberty" interest, see First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978), and its first amendment right truthfully to inform the public about its product, see Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); cf. Bigelow v. Virginia, 421 U.S. 809 (1975). It should seek access to the broadcast media to express its factually based "political" view that "ambient" smoke will not physically harm the non-smoker.

The broadcast media have wide discretion in determining which commercials will be aired. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). Their "journalistic freedom" could be influenced by a determined industry effort to take advantage of the recently

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in that request stating that these advertisements "would be particularly useful in warning the public about the health hazards of cigarette smoking . . . ." Public Service Ads During Prime Time Urged by 2 Agencies, Wall Street Journal, May 5, 1978, p.20, col. 6. See also FTC, Staff Report on Television Advertising to Children (1978).

protected right of the public to acquire consumer information via constitutionally protected commercial speech. If the industry can return to the broadcast media with truthful product commercials, it will have persuasive economic leverage to assure the running of controversial industry "political" advertisements.

In addition, because the Federal Communications Commission still intends to apply the fairness doctrine to commercials which are political, i.e., "editorials paid for by the sponsor," Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues, 35 Fed. Reg. 26372, 26380 (1974), the industry should seek a paid-for right of reply to the anti-public smoking advertisements if and when they appear.

From 1970 to 1974, the statutory ban against cigarette commercials protected the industry from anti-smoking advertisements required by the fairness doctrine. Circumstances have drastically changed. The fairness doctrine no longer applies to standard product advertisements. Massive anti-smoking and anti-public smoking campaigns have begun. With cigarette advertisements banned, the industry is at a considerable disadvantage in countering the effect of the inevitable. The course we suggest includes one or all of the following: a court challenge to 15 U.S.C. § 1335, the repeal of which could be politically impossible; a litigation-backed effort to make the fairness doctrine, which is

still applicable to political advertising, work for, rather than against the industry; and the establishment of first amendment protected status for tobacco industry political and commercial speech.

First Amendment Protection for Commercial Speech

The section 1335 ban of cigarette advertising is a classic prior restraint of corporate commercial speech.[1] At the time of its enactment, commercial speech did not receive first amendment protection. Today, corporations, including the tobacco industry, have first amendment rights. They are protected from unwarranted federal and state governmental infringement by the fifth and fourteenth amendments' liberty clauses.

> Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, . . . and the Court has not identified a separate source for the right when it has been asserted by corporations.

First National Bank v. Bellotti, 46 U.S.L.W. at 4375 (citations omitted). Although broadcasters are not common carriers[2] and, there is no general right of access to their air time, the government may not prohibit or impair the flow

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1. "[I]t shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335.

2. An example of an electronic media common carrier is the telegraph company, which must provide service to all who ask and are willing to pay.

of truthful and legitimate commercial information.[1] Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

In Bigelow v. Virginia, the Court, for the first time, openly criticized the denial of first amendment protection to commercial, as distinguished from political speech. "Regardless of the particular label . . . a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." 421 U.S. at 826. The distinction was finally laid to rest in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,

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1. First amendment protection had been denied to commercial speech in a brief opinion by Mr. Justice Roberts in Valentine v. Chrestensen, 316 U.S. 52 (1942).

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

316 U.S. at 54 (emphasis added). Valentine was criticized and undercut prior to its demise. See Lehman v. Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

in which the Court determined first that drug price advertisements were pure commercial speech and then held that such commercial speech was not wholly outside the protection of the first amendment. 425 U.S. at 762. See also Bates v. State Bar, supra; Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205 (1976); Note, U. Cin. L. Rev. 883 (1977).

In Linmark, the municipality passed an ordinance which prohibited the erection of "For Sale" and "Sold" signs on all residential properties except model homes. Attempts to distinguish Linmark from Bigelow and Virginia Pharmacy were rejected by the Court.

> If the . . . law is to be treated differently from those invalidated in Bigelow and Virginia Pharmacy, it cannot be because the speakers--or listeners--have a lesser First Amendment interest in the subject matter of the speech that is regulated here. . . . [T]he societal interest in "the free flow of information" . . . is in no way lessened by the fact that the subject of the commercial information here is realty rather than abortion or drugs.

431 U.S. at 92. Although the Court rejected the argument that other methods of communicating the same information existed and that the ordinance in question only regulated the time, place, and manner of the speech, it noted that the argument had significance. See, e.g., Adderley v. Florida, 385 U.S. 39 (1966); Kovacs v. Cooper, 336 U.S. 77 (1949). The bases for the rejection were the "serious questions"

concerning the existence of ample alternative modes of communication and the fact that the ordinance sought to prohibit the content of the speech rather than regulate the place and manner of the speech. 431 U.S. at 93-94. This, the Court held, the municipality could not do.

Prior restraint.--Because the first amendment now affords "some" protection to purely commercial speech, Bates v. State Bar, supra; Linmark Associates, Inc. v. Willingboro, supra; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Bigelow v. Virginia, supra, the government may not prohibit it without substantial justification. A particularly heavy presumption of unconstitutionality attaches to section 1335's prior restraint of protected speech.

Near v. Minnesota, 283 U.S. 697, 713 (1931), held "that it is the chief purpose of the [first amendment's] guaranty to prevent previous restraints upon publication." Prior restraints are the essence of censorship, see, e.g., Grosjean v. American Press Co., 297 U.S. 233, 249 (1936); accord, Nebraska Press Association v. Stuart, 427 U.S. 539, 588-89 (1976) (Brennan, J., concurring), and "[o]ur distaste for censorship--reflecting the natural distaste of a free people --is deep-written in our law." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975). "The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." Nebraska Press Association v. Stuart, supra at 589

(Brennan, J., concurring); see, e.g., Carroll v. Princess Anne, 393 U.S. 175, 180-81 (1968); Near v. Minnesota, supra. "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 559.

Professor Emerson has summed up the reason for the hostility towards prior restraints:

> A system of prior restraints is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than that suppression through criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of censorship shows.

T. Emerson, The System of Freedom of Expression 506 (1970).

Now that commercial speech is protected by the first amendment, the section 1335 prohibition is clearly a prior restraint of the cigarette industry's right to disseminate "truthful information about entirely lawful activity," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra, 425 U.S. at 773, and on the "consumer's concern for the free flow of commerical speech . . . to inform the public of the availability, nature, and

prices of products and services." Bates v. State Bar, supra, 433 U.S. at 364.[1]

First amendment protection against prior restraint is "not absolutely unlimited," however. Near v. Minnesota, supra, 283 U.S. at 716. But the existing exceptions--war, obscenity, violence, or overthrow of orderly government--do not apply to the tobacco industry's product or political advertisement.[2]

While prior restraint on speech is justified in certain "exceptional" circumstances, "[a]ny prior restraint on expression comes . . . with a 'heavy presumption' against its

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1. Although it seemed "unlikely" to the Court in Bates that commercial speech would be "crushed by overbroad regulation," 433 U.S. at 381, that is precisely the effect of the section 1335 prohibition.

2. The Court in Near set out three possible "exceptional circumstances." First, "'[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight.'" Id., quoting Schenck v. United States, 249 U.S. 47, 52 (1919). Second, "the primary requirements of decency may be enforced against obscene publications." 283 U.S. at 716. Third, "[t]he security of the community life may be protected against excitements to acts of violence and the overthrow by force of orderly government." Id. The "decency" and "violence" exceptions "have since come to be interpreted as situations in which the 'speech' involved is not encompassed within the meaning of the First Amendment." Nebraska Press Association v. Stuart, 427 U.S. at 590 (Brennan, J., concurring), citing Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). There is uncertainty about what, if anything, other than the "exceptional circumstances" recognized in Near, would overcome this "heavy presumption." In the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971), the threatened publication of classified information regarding this country's then on-going involvement in Vietnam was insufficient to justify even a temporary prior restraint which would have permitted study of the material and an assessment of its impact. The Court held that the government had not met the heavy burden necessary to justify prior restraint.[1] See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). However, as Chief Justice Burger noted in a later opinion, "every member of the Court [in the Pentagon Papers case], tacitly or explicitly, accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting).

In Nebraska Press Association v. Stuart, supra, the

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1. The six concurring justices and the three dissenting justices each wrote separate opinions. 403 U.S. 714 (Black, J., concurring); id. at 720 (Douglas, J., concurring); id. at 724 (Brennan, J., concurring); id. at 727 (Stewart, J., concurring); id. at 730 (White, J., concurring); id. at 740 (Marshall, J., concurring); id. at 748 (Burger, C.J., dissenting); id. at 752 (Harlan, J., dissenting); id. at 759 (Blackmun, J., dissenting).

Court followed Learned Hand and looked to "'the gravity of the "evil," discounted by its improbability [to determine whether it] justifies such invasion of free speech as is necessary to avoid the danger.'" 427 U.S. at 562, quoting United States v. Dennis, 183 F.2d 201, 212 (1950), aff'd, 341 U.S. 494 (1951). The Court noted that part of its task was to determine whether other, less drastic alternatives were available to preserve a defendant's right to a fair trial. The state failed to prove that a less drastic alternative was not available and that failure was a factor in the Court's finding that the state did not meet its "heavy burden imposed as a condition to securing a prior restraint." 427 U.S. at 562, 570.

The "heavy burden" may be lighter when commercial speech is involved. Bates v. State Bar, supra at 380-81; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra at 771 n.24. As the Court noted in Virginia Pharmacy, there are "commonsense differences" between commercial speech and other varieties. Id. "Some forms of commercial speech regulation are surely permissible."[1] 425 U.S. at

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1. The Court went on to state in a footnote:

> Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is

770; see Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661 (1977).

The Federal Trade Commission has prohibited false, misleading, or unsubstantiated cigarette claims. See, e.g., Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960), modified, 73 F.T.C. 439 (1968); R.J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950), modified, 192 F.2d 535 (7th Cir. 1951), modified, 48 F.T.C. 682 (1952), modified, 254 F.2d 23 (8th Cir. 1958). In other areas, the Supreme Court has held that the first amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949); see, e.g., National Society of Professional Engineers v. United States, 46 U.S.L.W. 4356 (U.S. April 25, 1978); Watson v. Buck, 313 U.S. 387 (1941).

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> necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.
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> . . . .
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> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints.

425 U.S. at 771-72 n.24 (emphasis added).

Prior speech restraint in the commercial area now must be subjected to "the critical scrutiny demanded under accepted First Amendment and equal protection principles." Buckley v. Valeo, 424 U.S. 1, 11 (1976). The government "may prevail only upon showing a subordinating interest which is compelling." Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); see NAACP v. Button, 371 U.S. 415, 438-39 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945). The "burden is on the government to show the existence of such an interest." Elrod v. Burns, 427 U.S. 347, 362 (1976). "Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment . . . .'" First National Bank v. Bellotti, supra at 4377, quoting Buckley v. Valeo, supra at 25; see NAACP v. Button, supra at 438; Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The clearest delineation of the extent to which the first amendment prohibits prior restraint of commercial speech has been Linmark Associates, Inc. v. Willingboro, supra. There, the only speech involved was the erection of "For Sale" and "Sold" signs on individual residential lots. The township had enacted an ordinance prohibiting the erection of the signs. Thus, only commercial speech affecting property rights was at issue. The Court struck down the statute, finding "no meaningful distinction between [the ordinance] and the statute overturned in Virginia Pharmacy," 431 U.S. at 97, and noted

that "[a]fter Virginia Pharmacy it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" 431 U.S. at 92 n.6.

> If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." Virginia Pharmacy denies government such sweeping powers.

Id. at 96-97.

Capital Broadcasting, supra, is the only reported decision challenging the section 1335 prohibition on cigarette advertising in the electronic media. It was brought by six radio broadcasters who sought to prevent enforcement of the statute on the ground that the ban prohibits the "'dissemination of information with respect to a lawfully sold product . . .' in violation of the First Amendment," 333 F. Supp. at 584, quoting Petition for Permanent Injunction at 4. The district court assumed that "product advertising is less vigorously protected than other forms of speech."[1] Id., citing Breard v. Alexandria, 341 U.S. 622, 642 (1951);

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1. Capital Broadcasting can be distinguished because it was decided before the Court explicitly recognized the first amendment quality of commercial speech and before it recognized in Bellotti that corporate first amendment rights are part of a corporation's "liberty" interest protected by the fifth and fourteenth amendments.

Valentine v. Chrestensen, supra; Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); and other cases. The district court concluded that

> [w]hether the Act [15 U.S.C. § 1335] is viewed as an exercise of the Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce, Congress has the power to prohibit the advertising of cigarettes in any media.

Id. Two members of the district court contended that broadcasters lost no right to speak; they merely lost the right to collect money from cigarette advertisers for broadcasting their commercials.[1] Regarding political speech rights, the court found "nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question." Id.

Circuit (now Chief) Judge Wright dissented in a sharply worded opinion.

> Cigarette smoking and the danger to health which it poses are among the most controversial and important issues before the American public today. Yet Congress,

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1. The district court also rejected the broadcasters' fifth amendment challenge that the classification of the media into two categories--those which are prohibited from advertising cigarettes and those which are not--was arbitrary and capricious. The district court applied a "reasonable basis" test. 333 F. Supp. at 585. The reasonable basis was "[s]ubstantial evidence . . . that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people." Id. at 585-86.

> in passing [15 U.S.C. § 1335], has suppressed the ventilation of these issues on the country's most pervasive communication vehicle--the electronic media. Under the circumstances, in my judgment, no amount of attempted balancing of alleged compelling interests against freedom of the press can save this Act from constitutional condemnation under the First Amendment. The heavy hand of government has destroyed the scales.

333 F. Supp. at 587.[1] Wright concluded that "[i]f the First Amendment means anything at all, it means that Congress lacks [power to shut off debate on a vital public issue]." 333 F. Supp. at 591. Particularly applicable to the contention that the tobacco industry has a right to counter anti-smoking views on the broadcast media is the following quote:

> The Surgeon General has stated and reiterated his official position that the health hazards of cigarette smoking make it an undesirable habit. The Government

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1. Cigarettes and their advertisements found no friend in Judge Wright. "[O]verwhelming scientific evidence makes plain that the Salem girl was in fact a seductive merchant of death--that the real 'Marlboro Country' is the graveyard." 333 F. Supp. at 587.

Wright noted the paradoxical effect of the congressional prohibition. Following Banzhaf v. FCC, supra, broadcasters were required to air anti-smoking commercials. With both sides of the issue being presented to the public, cigarette sales and the number of smokers were declining. While advertisements promoted brand loyalty, they did not induce people to smoke. When the ban became effective, anti-smoking and cigarette commercials left the airwaves. The cigarette industry increased its advertising in the print media, which had no fairness doctrine and was not required to run anti-smoking ads. Almost immediately, the downward trend in cigarette sales was reversed. Id. at 588-89.

> is, of course, entitled to take that position and to attempt to persuade the American people of its validity. But the Government is emphatically not entitled to monopolize the debate or to suppress the expression of opposing points of view on the electronic media by making such expression a criminal offense.

Id. at 593. Capital Broadcasting and 15 U.S.C. § 1335 were cited with approval by the Supreme Court in Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, 413 U.S. 376, 387 (1973).[1]

Because Capital Broadcasting and 15 U.S.C. § 1335 predate the demise of the commercial speech doctrine, different considerations exist today than when the Court summarily affirmed the finding of constitutionality. The attack in Capital Broadcasting proceeded from the perspective of the broadcasters' first amendment rights rather than those of the industry. Bigelow, Virginia Pharmacy, Bates, and Linmark create a new era of free expression for commercial enterprise--notwithstanding the reservations in those cases. Bellotti provides the basis for expanded corporate rights of political as well as commercial comment.[2] See also Linmark

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1. The only other cases which cite 15 U.S.C. § 1335 are Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976); Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971); Robinson v. ABC, 441 F.2d 1396 (6th Cir. 1971).

2. Corporations are persons for purposes of the fourteenth amendment. See, e.g., Bellotti, supra; Covington &

Associates, Inc. v. Willingboro, supra; United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Thus, a changed legal climate makes possible a direct assault on 15 U.S.C. § 1335.

This has the obvious disadvantage of attacking a statute which the tobacco industry helped forge for its own protection. As noted, the demise of the fairness doctrine for standard product commercials has removed the original reason

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Turnpike Rd. Co. v. Sandford, 164 U.S. 578 (1896); Santa Clara County v. Southern P.R.R., 118 U.S. 394 (1886).

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

First National Bank v. Bellotti, 46 U.S.L.W. at 4374.

for tobacco industry support of the statutory rule. Other reasons may exist. For example, tonight the only prime time "anti" commercials run will be by corporate advertisers engaged in a "defects derby" with the products of other corporations.

For cigarette companies, similar "anti" advertising could turn the race to sales into the last charge of the Light Brigade.

Regarding section 1335, there is another consideration. The Supreme Court may be preparing to ambush the industry. In the four commercial speech cases, the Court left open the possibility that a different rule may apply to prior restraints on the broadcast media by citing Capital Broadcasting Co. v. Mitchell, supra. Linmark Associates, Inc. v. Willingboro, supra at 94 & n.8 (Capital Broadcasting cited for proposition that a municipality may enact prior restraint legislation to protect certain groups); Bates v. State Bar, supra at 384 (Capital Broadcasting cited as indirect support for the proposition that "the special problems of advertising on the electronic broadcast media will warrant special consideration"); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra at 773 (Capital Broadcasting cited as indirect support for the proposition that "the special problems of the electronic broadcast media are likewise not in this case"); Bigelow v. Virginia, supra at 825

n.10 (Capital Broadcasting cited for following: "Nor need we comment here on the First Amendment ramifications of legislative prohibition of certain kinds of advertising in the electronic media, where the 'unique characteristics' of this form of communication 'make it especially subject to regulation in the public interest.'"). See also FCC v. National Citizens Committee for Broadcasting, No. 76-1471 (U.S. June 12, 1978); First National Bank v. Bellotti, 46 U.S.L.W. at 4376.

The fairness doctrine.--Exercise by the tobacco industry of its free speech rights is no longer threatened by the fairness doctrine, which, prior to 1971, had been used to require broadcasters to air anti-smoking commercials to "balance" cigarette commercials. Its current application to commercials which take sides on a public issue, but not to standard product advertisements, may provide the industry a potent weapon.

The fairness doctrine is an "implicit elaboration" of the Communications Act's public interest standard.[1] Note, 53 Iowa L. Rev. 480, 481 (1967). The doctrine has been recognized since at least 1929, when the Federal Radio Commission, precursor to the Commission, stated:

> Insofar as a program consists of discussion of public questions, public

1. The Communications Act provides that a broadcast license is to be issued, modified, or renewed only as the "public convenience, interest, or necessity" demands. 47 U.S.C. § 307(a).

> interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussion of importance to the public.

3 FRC Ann. Rep. 33 (1929). See also Barron, The Federal Communications Commission's Fairness Doctrine: An Evaluation, 30 Geo. Wash. L. Rev. 1 (1961). The doctrine was upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

The Commission has described the principles which support the doctrine.

> It is this right of the public to be informed, rather than any right on the part of government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter which is the foundation stone of the American system of broadcasting.

Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949), reprinted in 25 P & F Radio Reg. 1901, 1905 (1963). Thus, the fairness doctrine speaks to balanced programming; it is not an "equal time" doctrine. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 2 P & F Radio Reg. 2d 1901, 1903-04 (1964) [hereinafter cited as Applicability of the Fairness Doctrine].

> [T]hey [the fairness doctrine and the equal time doctrine] apply to different situations and in different ways. The

> "equal opportunities" requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions involving specified news-type programs, the law provides that if a licensee permits a person who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station.

Applicability of the Fairness Doctrine at 1903-04.

In 1949, the Commission suggested that the fairness doctrine could apply to advertisements for alcoholic beverages and that anti-alcohol viewpoints might be required.

> [T]he broadcasting of liquor advertisements may raise serious social, economic and political issues in the community, thereby imposing an obligation upon the station to make available time, if desired, to individuals or groups desiring to promote temperance and abstinence.

Broadcast Of Programs Advertising Alcoholic Beverages, 5 P & F Radio Reg. 593 (1949).

In 1967, the Commission held in Television Station WCBS-TV, 9 P & F Radio Reg. 2d 1423 (1967), that the fairness doctrine was applicable to cigarette advertising. Although licensees and other advertisers worried that the ruling would be extended to other products, the Commission held that cigarettes were a "unique" product and assured the broadcast industry that there would be no extension. Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 942-43 (1967). This was upheld in Banzhaf v. FCC, 405

F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), in which the court agreed that cigarettes were a "unique" product.[1] Id. at 1097 n.63.

In 1974, the FCC announced that the fairness doctrine would no longer apply to advertisements for commercial products or services. Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26372 (1974), reconsidered, 36 P & F Radio Reg. 2d 1021 (1976) [hereinafter Report].[2] In its 1976 reconsideration of the Report, the Commission

> adhere[d] to its determination that the public interest would be served best by not applying the fairness doctrine to standard product commercials (commercials which simply sell a product and do not deal meaningfully with a controversial issue of public importance). Application of the doctrine to cigarette commercials was a mistake because it departed from

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1. The uniqueness distinction did not last, however. In Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), the court held that "[w]hen there is undisputed evidence . . . that the hazards to health implicit in air pollution are enlarged and aggravated by [larger automobiles], then the parallel with cigarette advertising is exact and the relevance of Banzhaf inescapable." 449 F.2d at 1169. See also Retail Store Employees Local 880 v. FCC, 436 F.2d 248 (D.C. Cir. 1970) (union boycott).

2. For a defense of the Commission's previous application of the fairness doctrine to cigarette advertisements, see Comment, Fairness, Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission, 67 Colum. L. Rev. 1470 (1967).

> the doctrine's central purpose of developing an informed public opinion.

36 P & F Radio Reg. 2d at 1022-23 (emphasis added).[1] However, the Commission provided that the fairness doctrine would continue to apply to commercials which are in fact "editorials paid for by the sponsor," Report at 26380, and to advertisements which present "a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance." Report at 26381.

The health effects of smoke on non-smokers, and thus the need for anti-public smoking legislation, is an issue which cries out for spirited media debate. The industry may lose the argument, but it is certain to lose on the issue if there is no debate. The political nature of the current anti-public smoking campaign provides an opportunity for the presentation of tobacco industry views. This is "an area of the most fundamental First Amendment activities."[2] Buckley

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1. The Supreme Court recently refused to review a citizen group's unsuccessful challenge to an FCC decision not to apply the fairness doctrine to product advertising. National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 46 U.S.L.W. 3733 (U.S. May 30, 1978).

2.

> [The Supreme Court's] recent commercial speech cases . . . illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from

v. Valeo, 424 U.S. 1, 14 (1976); accord, First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978).

By its focus on "political issues," this type of speech is elevated to the "general public interest" rather than to the more narrow mere "hawking of wares." Bellotti, supra, at 4376 n.20. While right of access and equal time provisions may not apply to the tobacco industry, the fairness doctrine requires that a broadcaster present balanced dialogue on issues of public importance. "It is the

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> which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information."

Bellotti, supra at 4376. This area was defined in Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).

> The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fufill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

See also Gitlow v. New York, 268 U.S. 652 (1925).

right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[1] Red Lion Broadcasting Co. v. FCC, supra at 390. As stated by the Court in Bellotti:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

46 U.S.L.W. at 4376-77 (emphasis added and footnote omitted).

The Federal Communications Commission has ruled that the effect of cigarette smoking on the health of the smoker is no longer a "debatable public question," so the fairness

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1. The first amendment entrusts to the people "the responsibility for judging and evaluating the relative merits of conflicting arguments." Bellotti, supra at 4378 (footnote omitted). In order to carry out this responsibility, the people must have access to information. The news media are a primary source of information about issues of general public importance. Government's role ends once it ensures that the channels of communication are and remain open. It is then up to the people to evaluate the source of the information and to attach to it whatever credibility is appropriate. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." Bellotti, supra at 4378 n.31.

doctrine is unavailable to those who seek to answer anti-smoking advertisements. Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971). There is no consensus on the effect of "ambient" smoke on the normal non-smoker. Consequently, the fairness doctrine is available as a response to anti-public smoking advertisements. Id. at 883.[1]

Broadcast media discretion.--The broadcast media, although somewhat limited by the fairness doctrine, have wide discretion to determine what kinds of commercials will be aired. In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), a sharply divided Court upheld a station's refusal to accept an antiwar commercial and rejected a court of appeals ruling that a "flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted."[2] Business Executive's Move for

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1. If the government's anticipated campaign includes a significant amount of anti-smoking, as opposed to anti-public smoking advertisements, then the industry must consider whether it should or should not undertake a Supreme Court-destined challenge to the Federal Communications Commission ruling upheld in Larus.

2. The same court which was reversed in Columbia Broadcasting later upheld a Commission decision which declared that the three major networks had acted reasonably under the fairness doctrine in refusing to provide free air time to Democrats to reply to a presidential address on economic

Vietnam Peace v. FCC, 450 F.2d 642, 646 (D.C. Cir. 1971), rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee, supra.

The Court distinguished Red Lion Broadcasting Co. v. FCC, supra. Red Lion involved a challenge to the fairness doctrine brought by broadcasters who argued that application of the doctrine infringed their first amendment rights. The Court responded: "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a

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policy. Democratic National Committee v. FCC, 481 F.2d 543 (D.C. Cir. 1973).

> In light of these established principles it is clear that DNC [Democratic National Committee] was not entitled automatically to any right to reply. That there is no equal-opportunities rule in the context of the fairness doctrine is now beyond dispute. The Commission must look to all the relevant facts and circumstances to determine whether the public has been left uninformed of opposing viewpoints during the period in question and the burden is on the petitioner to show that the networks had not exercised reasonable judgment in this regard.

Democratic National Committee v. FCC, 481 F.2d 543, 547 (D.C. Cir. 1973). See also Kuczo v. Western Connecticut Broadcasting Co., 566 F.2d 384 (2d Cir. 1977) (station's censorship of mayoral candidates' scripts did not constitute governmental action and therefore was not subject to the first amendment).

denial of free speech.'" 395 U.S. at 389. The Court continued:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

395 U.S. at 390 (emphasis added).

Columbia Broadcasting employed a "balancing test" to determine "what best serves the public's right to be informed," 412 U.S. at 102, and emphasized the wide discretion of broadcasters:

> [I]t seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the [Communications] Act.

412 U.S. at 110. The Court concluded that the policy of the Commission and the Congress was that there was no right on the part of any individual or group to command the use of broadcast facilities.[1] 412 U.S. at 113.

In part IV of the Opinion, the Court (Burger, White, Stewart, and Rehnquist) considered whether "the 'public

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1. Up to this point in the Court's opinion, Chief Justice Burger had the support of five other justices

interest' standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment." 412 U.S. at 121. Answering no, the Court agreed with the Commission "that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits." 412 U.S. at 122-23.

In Columbia Broadcasting, the Court was influenced by the power that the financially affluent or those with access to wealth would have and the administrative burdens that would fall on the Commission should the Court uphold a right

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(Stewart, White, Blackmun, Powell, and Rehnquist). Douglas wrote an opinion concurring in the results; Brennan and Marshall dissented.

In part III of the opinion, in which only Stewart and Rehnquist joined, Burger discussed whether "a broadcaster's refusal to accept editorial advertisements is governmental action violative of the First Amendment." 412 U.S. at 114. Burger found no governmental action in the broadcaster's decision not to accept advertisements.

> Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness.
>
> Moreover, the Commission has not [yet determined] that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements . . . ; it has, for the present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee.

412 U.S. at 118-19.

of access.[1] 412 U.S. at 123-32. However, in the last three years, the Court has rejected this wealth-related reasoning. See Buckley v. Valeo, 424 U.S. 1 (1976)

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1. The Court also rejected a limited right of access for the national political parties. 412 U.S. at 127 n.21.

Justices Stewart and White argued that the broadcaster has the right to determine its own programming and methods of complying with the requirements of the fairness doctrine. Justices Blackmun and Powell contended that the question of whether there was governmental action should not have been reached by the Court.

Justice Douglas argued that "TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines." 412 U.S. at 148. Thus, Douglas, who did not participate in Red Lion, would not have supported its upholding of the fairness doctrine. Id. at 154.

> The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. . . . Under our Bill of Rights people are entitled to have extreme ideas, silly ideas, partisan ideas.

412 U.S. at 154-55. Douglas expressed great alarm over the thought that the government might control the news media.

> But the prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of people. . . . And it is anathema to the First Amendment to allow Government any role of censorship over . . . any . . . aspect of the press.

412 U.S. at 162.

Justices Marshall and Brennan favored an abridgment

(striking down a wealth-related restriction of the campaign finance law) and First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978) (upholding corporation's first amendment right to spend money to publicize its views in opposition to referendum proposal). In Buckley v. Valeo, the Court stated:

> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.

424 U.S. at 45. However, in Bellotti, the Court implicitly recognized that the fairness doctrine may limit the amount persons or corporations may spend. "[I]n the special context of limited access to the channels of communication," Bellotti, supra at 4378 n.30, the fairness doctrine requires that broadcasters present opposing viewpoints and to that extent prevents any one group from completely dominating the broadcast media. See Red Lion Broadcasting Co. v. FCC, supra.

The right to reply.--Although there is no general

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of the first amendment rights of broadcasters. They argued that under the first amendment, broadcasters could be required to sell advertising time and could not establish an absolute denial of access for publication of a particular view. 412 U.S. at 196-204.

right of access to the broadcast media, Columbia Broadcasting, supra, certain circumstances trigger such a right. Under existing regulations if the tobacco industry's opponents present a controversial issue of public importance in advertisements, and attack certain "personal qualities" of an "identified person or group," reply time is required.[1]

Access is also assured when a controversial bill is pending (as is now and will be the case). "[I]f advocates of its passage have access to a licensee's facilities, so must opponents."[2]

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1. 47 C.F.R. § 73.123(a) (1976) provides:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities. [Emphasis added.]

2. National Broadcasting Co. v. FCC, 516 F.2d 1101, 1130, vacated, 516 F.2d 1155 (1974), opinion & judgment reinstated en banc, remanded to panel for consideration of mootness, 516 F.2d 1156, vacated as moot, 516 F.2d 1180 (D.C. Cir. 1975), cert. denied, 424 U.S. 910 (1976), citing In the Matter of Editorializing by Broadcast Licensees, 1-3 F.C.C. 1246, 1250-51 (1949).

V

# CHAPTER V

## A BRIEF FACTUAL AND LEGAL HISTORY OF PROHIBITION

### Introduction

A constitutional amendment was chosen as the vehicle for prohibition because federal and state legislation was ineffective in controlling the liquor trade. State efforts clashed with the interstate commerce clause of the Constitution. Absent an enabling power in the Constitution, Congress could not, on its own, control liquor through the passage of federal statutes.[1]

National prohibition was effected by the eighteenth amendment ("the amendment") from January 16, 1920 through December 5, 1933, when it was repealed by the twenty-first

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1. However, this was before the development of the modern "affectation doctrine" under which Congress has the power to regulate any activity which has an appreciable effect on interstate commerce--even if it is indirect. The doctrine was derived from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), a case which upheld the National Labor Relations Act of 1935 which established the right of employees to organize and bargain collectively in industries affecting commerce. The doctrine has been employed in various areas. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (prohibiting under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., discrimination in places of public accomodation); Wickard v. Filburn, 317 U.S. 111 (1942) (regulation of farm production); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (permitting federal regulation of the intrastate marketing of products since such marketing might interfere with interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as applied to an entire industry although only part of that industry affected interstate commerce).

amendment. The eighteenth amendment stated:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The amendment represented the culmination of an interplay of social, religious, political and legal forces. The Volstead Act, October 28, 1919, ch. 85, 41 Stat. 305, provided for the enforcement of the amendment. The constitutionality of the amendment and the Act was upheld by the Supreme Court in the National Prohibition Cases, 253 U.S. 350 (1920).

One prohibition-era scholar, Howard McBain, contended that it was a mistake to establish liquor policy through the amendment process:

> With a few exceptions . . . the constitution does not fix policies. It grants powers and within these powers Congress shapes the policies. If national control over the liquor traffic was desirable at all, it would doubtless have been far better had the amendment followed this usual constitutional form--granting the power to

> Congress to regulate or prohibit instead of establishing an inexorable policy.[1]

Elsewhere it has been noted that this amendment did grant Congress the power to regulate liquor:

> Since the Federal Government has no powers except those specifically conferred by the Constitution, or those to be reasonably inferred therefrom, it was necessary by amendment to confer upon its [sic] power to prohibit, not the interstate traffic in liquor, but its manufacture, transportation, and sale within the several states.[2]

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1. H. McBain, Prohibition Legal and Illegal 36 (1928).

2. Note, Experiments in Various Forms of Control of the Liquor Traffic, 23 Iowa L. Rev. 635, 643 (1938) [hereinafter Experiments] citing Finerty, States' Rights Under the Federal Prohibition Law, 8 Notre Dame Law. 15 et seq. (1932) (emphasis in original) (footnote omitted).
Arguably, under the modern "affectation doctrine" regarding the commerce power (art. I, § 8, cl. 3), Congress might be able to regulate intrastate traffic in liquor or tobacco that affects interstate commerce. A possible alternative is the taxing power (art. I, § 8, cl. 1). Under it Congress passed the Harrison Narcotic Drug Act, Dec. 17, 1914, c.1, 38 Stat. 785, which aimed at confining the sale of narcotic drugs to registered dealers, dispensing physicians, and those with prescriptions from physicians. The Act imposed a tax on those required to be registered under it. The constitutionality of the Act was upheld since it was seen as a means of facilitating the collection of revenue. United States v. Doremus, 249 U.S. 86 (1919). However, four dissenting justices found the Act unconstitutional in that it represented an attempt to exercise a power which was not delegated, namely, the reserved police power of the states. Id. at 95.
The constitutionality of a provision of the Act, as amended, was before the Court in Nigro v. United States, 276 U.S. 332 (1928). The first section of the Act was revised by the Revenue Act of 1918 to include an excise tax

Ebb and Flow of State Experimentation

Merz notes that prior to the eighteenth amendment, state experimentation with prohibition occurred in three waves:

> [T]he first great wave of prohibition swept the country as long ago as the 1850's. Between 1846 and 1855 thirteen

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on drugs. It was not challenged. Rather, the constitutionality of a provision in the second section of the Act was questioned. That section made it unlawful for any person to sell drugs except under the written order of the buyer on a form provided by the Commissioner of Internal Revenue. The Court found the provision constitutional although a dissenter disagreed:

> The plain intent is to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions, and this amounts to an attempted regulation of something reserved to the states. The questioned inhibition of sales has no just relation to the collection of the tax laid on dealers.

Id. at 356.

In viewing the Act as a whole, the Court commented:

> [W]e must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid. . . .

Id. at 341. To obviate a constitutional attack such as that in Doremus and Nigro, the Marijuana Tax Act allows transfer of marijuana to unregistered persons upon the payment of a large ($100 per ounce) transfer fee. Leary v. United States, 395 U.S. 6,22 (1969).

> states adopted prohibition laws. . . . This early wave of prohibition soon receded. Some of the laws were declared unconstitutional by the courts. Others were nullified by later legislation. Still others were repealed. By 1863 the thirteen prohibition states had shrunk to five.
>
> A second wave of prohibition began in the 1880's. . . . In 1880 Kansas wrote prohibition into its Constitution. . . . By 1890 North and South Dakota had adopted prohibition laws. Iowa and Rhode Island, having repealed their earlier legislation, were now experimenting with prohibition for a second time.
>
> Once more the movement ebbed. Out of the legislative battles of the 1880's three states emerged with prohibition laws by 1905. These three were Kansas, Maine and North Dakota.
>
> [I]t was out of this decade of experiment that the third great wave of prohibition started. Georgia led the way in 1907. In rapid succession Oklahoma, Mississippi, North Carolina, Tennessee and West Virginia fell into line.[1]

Between 1914 and 1916, fourteen more states adopted prohibition, bringing the total number of prohibition states to 23.[2] By February 1917, two months before the United States entered World War I, the total number of prohibition states

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1. C. Merz, The Dry Decade 3-4 (1931).

2. Id. at 16-17.

had increased to 26.[1] Merz notes, however, that prohibition in these states did not foreshadow prohibition under the eighteenth amendment, for only thirteen of the states were bone-dry.[2]

"On the eve of the war . . . [l]ocal option was still the established principle in most of the populous industrial states."[3] "[P]rohibition was . . . a method favored principally in the agricultural states of the West and South. Its gains in the East and North were relatively unimportant."[4]

By 1919, 32 states had statewide prohibition. The remaining 16 had liquor licensing systems. Of these 16, all but two (New York and Pennsylvania) had local option statutes in force.[5]

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1. Id. at 19.

2. Id. at 22. Others adopted legal means for obtaining liquor. For example, Alabama citizens were permitted to import two gallons of distilled spirits or two gallons of wine or five gallons of beer every 15 days. Id. at 20-21.

3. Id. at 23.

4. Id. at 19.

5. Note, Experiments, supra at 643.

The Drive Towards National Prohibition

The third and final surge towards national prohibition resulted from several factors. The constitutionality of state local-option legislation[1] had been upheld in the License Cases, 46 U.S. (5 How.) 504 (1847). The fact that every state had some sort of prohibition in effect supplied a justification for national prohibition--the majority of citizens were already living under prohibition by their own volition.[2] The importance of voter education during the pre-World War I years cannot be overemphasized for "all of the state prohibition laws which were enacted in this country prior to the war were enacted by the affirmative votes of less than 4 per cent of the adult population of the country."[3]

Another key factor leading to passage of the eighteenth amendment was the strength of a "public-interest" group--the well-organized and politically adept Anti-Saloon League.

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1. Local option meant that the individual counties in an otherwise dry state could determine for themselves whether to allow liquor to be sold.

2. License Cases, 46 U.S. (5 How.) 504 (1847).

3. Merz, supra at 19. Another reason for national prohibition was that "state laws were often vitiated in effect by the illicit overflow from 'wet' areas despite the Reed Amendment." Experiments, supra at 643 (footnote omitted). The Reed Amendment made it illegal to transport liquor into a dry state. See infra at pp. 13-14.

Despite the spread of state prohibition laws in the pre-war years, per capita consumption of liquor steadily grew, from four gallons a year in 1850 to 23 gallons by 1913.[1] Much of the agitation for national prohibition resulted from the inability of dry states to protect themselves from liquor shipments into or through the state.[2]

Opponents of the Anti-Saloon League, the brewers and distillers, scorned compromise and reform:

> [T]here was never a moment in the history of these years when the brewers could not have reformed the institution which was the chief point of attack in the campaign against their vested interests made by the prohibition movement (the saloon) . . . . The power of the brewers over the saloon was absolute. They controlled it under mortgage bonds and under their power to shut off its supply.[3]

According to Merz, the First World War did three things for national prohibition: it centralized authority in Washington, it stressed the need for saving food, and it outlawed things German, such as beer.[4] With patriotism on its side, prohibition was the result.

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1. Id.

2. E. Helms, The Eighteenth Amendment 3 (1928) (abstract of a Ph.D. thesis).

3. Merz, supra at 5.

4. Merz, supra at 25.

Aiding the prohibitionist's cause was the link between the liquor trade and political skullduggery. For example, the Whiskey Ring and the Whiskey Trust were exposed in the post-Civil War years. Moreover, in 1919, a report to the Senate

> . . . disclosed that the brewers had bought large sections of the press, had influenced campaigns, had exacted pledges from candidates prior to election, had boycotted the goods of their enemies, had formed their own secret political organization, had subsidized the banned German-American Alliance, "many of the membership of which were disloyal and unpatriotic," had formed a secret agreement with the distillers to split political expenses, and had done their utmost to subvert the processes of democracy.[1]

Another key factor in the movement was the 1899 arrival of the Anti-Saloon League in Washington. They came to lobby. "For twenty years after 1913, the League Lobby . . . was the most powerful and successful reform lobby in Washington."[2] Supporting the League was the spiritualism of Protestant revival. Liquor was evil and the saloon was the devil's workshop.

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1. A. Sinclair, Prohibition--The Era of Excess 153 (1962) (footnote omitted).

2. Id. at 154.

Federal Measures and Court Interpretations

Congress passed a prohibition resolution in December 1917. Less than fourteen months later, on January 16, 1919, the necesary three-fourths of the states had ratified it. It became effective a year later.

The Volstead Act, ch. 85, 41 Stat. 305, passed on October 28, 1919, defined intoxicating liquor as that which contained one-half of one per cent or more of alcohol, by volume. The amendment outlawed only the import, export, manufacture, sale, or transportation of intoxicating liquors used for beverage purposes, into and within the United States. The Volstead Act went further, prohibiting the possession, bartering, delivering, and furnishing of intoxicating liquor.

The eighteenth amendment and the Volstead Act were the final results of a series of federal enactments and court interpretations. The Supreme Court had indicated that the states' right to prohibit liquor sales was subject to the paramount federal power over foreign and interstate commerce. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), struck down a state statute which required liquor importers to pay a license tax, on the ground that the statute interfered with foreign commerce. Brown established the principles that "a State may not tax goods imported from abroad, as

long as they remained in the 'original package' in the hands of the importer; and that the right to import includes the right to sell."[1]

However, in the License Cases, supra, the Supreme Court upheld a state statute requiring that liquor dealers be licensed even though the liquor was sold in the original barrel in which it was brought into the state. For several decades, when Congress was silent regarding a commodity in interstate commerce, state laws were applied.

Leisy v. Hardin, 135 U.S. 100 (1890), in effect reversed the License Cases and held that a state could not prohibit, directly or indirectly, a dealer from importing liquor in the course of interstate commerce and reselling it in its original package.

Two years before Leisy, the Supreme Court in Bowman v. Chicago & Northwestern Railway, 125 U.S. 465 (1888), had found invalid a state statute which required a common carrier to obtain a certificate from the county of the consignee prior to transporting intoxicating liquor into the state. The Leisy Court wrote: "[T]ransportation of commodities between the states shall be free, except where it is positively restricted by congress itself, or by states in particular cases by the express permission of congress." 135 U.S. 100,

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1. E. Corwin, The Constitution 55 (H. Chase & C. Ducat rev. 1973).

113. Under Bowman even in states with statewide prohibition, the police power could not be extended to prohibit the importation of liquor.

After Leisy and Bowman state prohibition laws were insufficient to control the liquor trade. Liquor dealers established warehouses in dry states from which liquor, in original packages, was sold intrastate. The dry states were forced to look to Congress to provide a means of controlling these intrastate sales. See Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 174, 288 (1916), cited in Experiments, supra at 638 nn.23 & 25.

In 1890, the year Leisy was decided, Congress passed the Wilson Act, 27 U.S.C. § 121, which made intoxicating liquor subject to state law upon its arrival. "Arrival," meant, "arrival at the point of destination and delivery there to the consignee." Rhodes v. Iowa, 170 U.S. 412, 426 (1898).

In Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898), a companion to Rhodes, the Supreme Court decided that a dry state resident could import liquor for his own use. Local law was applicable only after the liquor was actually or constructively received. Thus, only resale of liquor by someone other than the consignee could be prohibited by state law.

Immediately, a flourishing mail-order trade in liquor grew even in states which prohibited liquor. The abuse of the intent of the Wilson Act was so great that, in 1909, it was made a federal crime for a carrier to accept C.O.D. liquor shipments or knowingly to ship liquor to fictitious consignees or to transport unlabeled liquor in interstate commerce.

Because the thrust of the Wilson Act had been blunted by judicial construction, Congress passed the Webb-Kenyon Act, 27 U.S.C. § 122. This Act prohibited the interstate shipment of liquor if the liquor was intended to be used in violation of state law. It was interpreted to mean that interstate shipment of liquor was subject to state law when it arrived at any point within the state. But the Webb-Kenyon Act was a paper tiger. It contained no federal penalty for its violation, no prohibition on the use of imported liquor, and a loophole through which liquor shipped through dry states to wet states would be diverted after entry into the dry state to a location within that state.

The drys went back to work. Congress passed the Reed "Bone Dry" Amendment to the Postal Service Appropriation Act of 1917. The Amendment closed most of the Webb-Kenyon loopholes, prohibited the use of the mails for circulating liquor advertisements, and made it illegal for any person to

transport, purchase, or order liquor to be transported in interstate commerce into a state whose laws prohibited its manufacture or sale. An exception was made for liquor used for mechanical, sacramental, scientific, and medicinal purposes. Thus, for the first time, a state could legally become "bone dry."

Again, a loophole. The statute did not apply to states in which local option was in effect. Rather, it applied only to those states with statewide prohibition.

In 1917 national circumstances changed and the persistence of the drys paid off. Under the 1917 Food Control Law the distilleries were closed.[1] Congress enacted prohibition for the District of Columbia, Alaska, and Puerto Rico. Dry zones were established around military bases and soldiers and sailors were prohibited from drinking. The eighteenth amendment was passed. Sinclair notes several reasons why:

> [T]he widespread prohibition legislation of the powers engaged in the Great War and the certainty that America would enter that war gave the drys a strong lever. When Europe was starving, how could America in God's name turn its grain into sinful drink?[2]

In 1918 the breweries were closed because of a drought

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1. Merz, supra at 40.

2. Sinclair, supra at 156.

and a need for draftees. In the same year, the War-Time Prohibition Act was passed under Congress' war power in order to increase the national food supply. Act of November 21, 1918, 40 Stat. 1045, upheld, Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919).

As for the rationale behind wartime prohibition, one senator stated: "There is nothing to understand except one thing, and that is that bread will help us win this war more than whiskey."[1] The Act prohibited liquor production in the United States. Ironically, it became effective on July 1, 1919, at the beginning of the seventh month of peace.

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1. Id. at 157.

The Eighteenth Amendment

The eighteenth amendment did not prohibit the use of liquor. The powerful Anti-Saloon League lobby "wanted to punish makers and sellers of liquor, not respectable drinkers. . . . [T]hey could not afford to alienate the majority of the Senators, who were drinkers."[1]

Section 2 of the amendment stated that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." This clause was inserted by Congressman Webb in an attempt to protect states' rights.[2] It led to complications in interpretation, however, until the Supreme Court explained that "concurrent power" did not mean joint power, but rather, that existing state legislation contravening the Volstead Act was superseded by paramount federal power. Absent such contravention, state statutes were viable as a means of enforcing the amendment. Rhode Island v. Palmer, 253 U.S. 350 (1920); see Experiments, supra at 644.

The persistence of the drys and the boredom of the senators and congressmen each contributed to passage of the amendment.

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1. Id. at 159.

2. Id. at 161.

Sinclair notes that the members of Congress "were sick of being badgered by the Anti-Saloon League and their dry constituents."[1]

Rural areas were overrepresented in the United States Senate and state senates. Thus, "national prohibition was a measure passed by village America against urban America."[2] The drys preferred the constitutional amendment route to state referenda.[3] Sinclair writes:

> [T]he populous cities often upset dry majorities in country areas during state referendums. Ohio, itself, the headquarters and home state of the Anti-Saloon League leaders, did not pass statewide prohibition until 1918, owing to the opposition of Cincinnati and other wet cities. But if the League could only cow the lower house of the various states into passing a constitutional amendment, they could rely on the country majorities in the senates to support them.
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> While the vote in the House of Representatives on the Eighteenth Amendment gave the measure a bare two-thirds majority, in the Senate the measure passed by a majority of more than three to one. . . . A similar disproportion is shown

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1. Id. at 162.

2. This conclusion is confirmed by the fact that San Francisco, St. Louis, St. Paul, Chicago, Cincinnati, Cleveland, Detroit and Boston all rejected prohibition laws during the period when the Eighteenth Amendment was being considered by Congress and the states.

Id. at 163 (footnote omitted).

3. Id. at 164.

> when the votes of the senates and lower houses of the ratifying states are compared. While the combined senates of the forty-six ratifying states voted 1310 to 237 to carry the amendment, the combined lower houses voted 3782 to 1035.[1]

The Anti-Saloon League was politically astute. "The first step was to pass the amendment in any form; the second was to pass a severe law to enforce it."[2] The amendment had certain flaws. For example, it did not prohibit the use, purchase, or possession of liquor. Therefore, a person could stock up on alcoholic beverages prior to the effective date of the amendment. Sinclair contends that this increased class hatred, for the poor could not afford to stock up.[3] Another loophole was the absence of prohibition of the instruments for making home-made liquor. So Sears, Roebuck and Co. sold home distilling kits by mail for under five dollars.[4] The amendment used the term "intoxicating" rather than "alcoholic." This caused enforcement difficulties for it was harder to prove that liquor was intoxicating than to prove it alcoholic.[5]

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1. Id. (footnote omitted).
2. Id. at 165.
3. Id.
4. Id. at 156.
5. Id. at 156.

The Volstead Act

The drys contended that demobilization was part of the war and, therefore, the Volstead Act, October 28, 1919, ch. 85, 41 Stat. 305, was part of the enforcement of wartime prohibition. This was anamolous, for the Act was passed after the Armistice. For this reason, President Wilson vetoed the Act. Congress overrode the veto.

The Commissioner of Internal Revenue was charged with enforcement. United States attorneys were to prosecute. The Act provided for the manufacture of industrial alcohol and for denaturing it to prevent human consumption. Personal property used in transporting liquor could be confiscated and sold at public auction. The proceeds were used to defray enforcement costs. No search warrant was to issue to search any private dwelling "occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house." Volstead Act, id. § 25.

The Act permitted the making and possession of light wine and hard cider at home--a measure which favored the farm over the city.[1] The sale of wine to be used for religious purposes was also permitted. Furthermore, the purchase of liquor was not prohibited. The use of liquor in

1. Id. at 169.

one's home was not prohibited and such liquor was exempt from the Volstead reporting requirement:

> Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and his bona fide guests when entertained by him therein. . . .

Volstead Act, id. § 33.

## Conclusion

The eighteenth amendment resulted from a convergence of forces--social, political, religious, and legal. State and federal legislation inadequately controlled the liquor traffic. A key factor was the creation of and powerful lobbying by a highly motivated public interest group, the Anti-Saloon League. The brewers and distillers failed to draw widespread grass roots organizational support. They did not move to reform the saloon. Abstinence and temperance became identified with religious and moral uprighteousness, and prohibition linked to patriotism (grain for food rather than drink) in an effort to win World War I.

VI

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# CHAPTER VI

## A BRIEF SURVEY OF SUPREME COURT AND SELECTED STATE COURT CONSIDERATIONS OF THE CONSTITUTIONALITY OF STATE CIGARETTE LEGISLATION

Austin v. Tennessee, 179 U.S. 343 (1900), dealt with a statute prohibiting the selling of cigarettes, cigarette paper, or a substitute for the same. The divided Court (which split 4-4 with one concurrence to make a majority) held that cigarettes are a legitimate article of commerce and a restriction or prohibition of their sale enacted by a state to protect public welfare and health is within the police power.

The Court relied on earlier cases regulating the sale or manufacture of liquor. See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887); Foster v. Kansas ex rel. Johnston, 112 U.S. 201 (1884) ("settled" that state laws prohibiting the sale and manufacture of intoxicating liquors were not unconstitutional); Kidd v. Pearson, 128 U.S. 1 (1888) (state might prohibit or regulate the manufacture of liquor without compensating persons, whose property was used for such manufacture, for the property's diminution in value); Boston Beer Co. v. Massachusetts, 97 U.S. (7 Otto.) 25 (1878) (a company chartered for the purpose of making malt liquor held its franchise subject to the police power of the state, which the state might use to prohibit such manufacture in the interest of public safety or morals); Bartemyer v. Iowa,

85 U.S. (18 Wall.) 129 (1874) (holding that the right to sell intoxicating liquor was not a privilege or immunity which the fourteenth amendment forbids the states to abridge); License Cases, 46 U.S. (5 How.) 504, 576 (1847) (recognizing the right of a state to regulate or prohibit sale of ardent spirits "after it [the liquor] has passed the line of foreign commerce, and become a part of the general mass of property in the state"). See also Powell v. Pennsylvania, 127 U.S. 678 (1888) (state interest in preventing adulteration and fraud in the sale of dairy products sufficient to support statute prohibiting sale or manufacture of oleomargarine); Plumley v. Massachusetts, 155 U.S. 461 (1894) (statute prohibiting the sale of oleomargarine artificially colored to look like butter upheld against attack based on the commerce clause).

The Austin Court declined to judicially notice that cigarettes were inherently bad, yet the plurality did recognize the general belief that cigarettes have deleterious effects, particularly upon young people.

> Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be

> used as against such as are imported from other States, and there be no reason to doubt that the act in question is designed for the protection of the public health.

Austin v. Tennessee, supra at 348-49.

The Court in Austin noted that it repeatedly had held that state laws enacted under the police power may interfere indirectly with interstate commerce. Id. at 349. Furthermore, regarding the police power, the Court held in Holden v. Hardy, 169 U.S. 366, 392 (1898), that the state legislature has discretion to determine what measures are necessary for the protection of public health, safety, and morals. The Austin Court recognized that

> although the State of Tennessee may not wholly interdict commerce in cigarettes it is not, in the language of Chief Justice Taney in the License Cases, "bound to furnish a market for it [them], nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the General Government [sic]."

Austin, supra at 350, quoting 46 U.S. (5 How.) 504, 577.[1] The Court stated that it did not doubt the good faith of the Tennessee legislature in prohibiting the sale of cigarettes as a sanitary measure. Austin, supra at 350.

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1. In referring to interdiction, the Court apparently meant that a state must permit the sale by the importer of goods from abroad which Congress authorizes to be imported.

The Original Package Doctrine

In Austin, defendant bought small packages of cigarettes which arrived in a basket. The Court regarded defendant's claim that each pack was an original package as a "discreditable subterfuge," indicating that if any original package was involved, it was the basket. Id. at 361.

The original package doctrine, first recognized by the Supreme Court in 1827 in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), protected commerce from abroad or from a sister state so long as the article remained in the original package in which it was brought into the state. While the doctrine still applies to imports from abroad, state taxation of imports from a sister state is now permitted.[1] Thus, a state tax, which is nondiscriminatory as to goods brought into the state from another state, is valid regardless of whether or not the goods are in their original package.

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1. A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state.

Sonneborn Bros. v. Cureton, 262 U.S. 506, 516 (1923).

Regulation of Cigarette Selling

Gundling v. Chicago, 177 U.S. 183 (1900), affirmed a conviction under a municipal ordinance forbidding the sale of cigarettes without a license.[1] The ordinance authorized the mayor to determine whether a person applying for a license to sell cigarettes had good character and reputation and was suitable to be entrusted with their sale, but required him to grant the license if these conditions were met. This, the Court held, did not vest in the mayor arbitrary licensing power in violation of the fourteenth amendment. The Court stated:

> Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the State, and through it for the city to determine for itself. . . .

Id. at 187.

State v. Nossaman, 107 Kan. 715, 193 P. 347 (1920), appeal dismissed, 258 U.S. 633 (1922), upheld a statute which prohibited the barter, sale, or gift of cigarettes or cigarette papers, and the possession of same for the purpose of barter, sale, or free distribution, as within the state's

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1. The ordinance prevented cigarette sales within 200 feet of a school and it required the posting of a bond conditioned on the observance of relevant Illinois laws and Chicago ordinances.

police power. Defendant contended that the statutory classification was arbitrary and unreasonable and, therefore, a denial of equal protection and due process under the fourteenth amendment since the statute prohibited sales of tobacco in one form but not in others.[1]

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1. A similar claim had been made but turned aside by the Illinois Supreme Court in Gundling, supra:

> It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular form of tobacco.

Gundling v. Chicago, 176 Ill. 340, ___, 52 N.E. 44, 45 (1898), aff'd, 177 U.S. 183 (1900).

Taxation

In Cook v. Marshall, 196 U.S. 261 (1905), the Court found valid a state tax on retail sales of cigarettes (in unaddressed boxes of 10 each). It determined that such taxation was not an invalid regulation of commerce since such boxes were not original packages.[1] It indicated that selling at retail and at wholesale are two entirely distinct occupations. Id. at 275. Thus, a retail tobacco dealer was not denied equal protection because the tax on selling cigarettes did not apply to jobbers and wholesalers conducting interstate business with out-of-state customers.

In Hodge v. Muscatine County, 196 U.S. 276 (1905), the Court affirmed a refusal to enjoin the assessment and collection of the Iowa tax on cigarette sales. Two Iowa laws were in question: section 5006 provided for a fine and imprisonment for selling cigarettes and section 5007 imposed a $300 annual tax against every person and his property whereon cigarettes were sold or kept with the intent to be sold. Since payment of the tax did not bar prosecution under section 5006, the Court concluded that the tax in question was meant to be a deterrent. The Court upheld the state's

1. This case was decided before the abandonment of the original package doctrine in 1923 in so far as it related to interstate shipments.

right to elect to tax (under section 5007) or to prohibit (under section 5006). It concluded that due process was not denied by section 5007 since the owner of the property could have the assessment reviewed by the board of supervisors and the courts. The Court also held that due process did not require that a cigarette seller be given notice of the $300 levy, since there was no discretion involved as to the amount of the assessment.

In Commonwealth v. Flickinger, 365 Pa. 59, 73 A.2d 652, cert. denied, 340 U.S. 843 (1950), defendant brought 350 cartons of untaxed cigarettes home from out-of-state in violation of a statute which prohibited possession of untaxed cigarettes. This statute was upheld against a charge that it discriminated against interstate commerce because it applied to all cigarettes coming to rest within the state, regardless of origin, and it was seen as a valid exercise of the state's police power. Any detriment to interstate commerce was deemed incidental.

In People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953), defendants were charged with conspiracy to evade the state's cigarette tax act by importing cigarettes into the state without a license and the required permit and without paying the required excise tax. It was contended that they planned to sell the cigarettes in Michigan. The permit cost of $1 was seen by the court as nominal and not so burdensome as to interfere with interstate commerce.

Asta relied on Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) and Duckworth v. Arkansas, 314 U.S. 390 (1941). Duckworth upheld an Arkansas statute which required a permit (costing a nominal amount) for the transportation of liquor through the state as a valid means of deterring diversion of the liquor shipment. The Michigan Supreme Court noted that the state cigarette control laws were an insubstantial burden on interstate commerce, citing Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950):

> The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. . . . It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. . . . The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation.

Id. at 186-87 (citations omitted).[1]

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1. Compare Raymond Motor Transportation, Inc. v. Rice, 46 U.S.L.W. 4109 (U.S. February 21, 1978) with Duckworth v. Arkansas, supra. In Raymond the Court struck down Wisconsin's

In Neeld v. Giroux, 24 N.J. 224, 131 A.2d 508 (1957), the defendant was transporting unstamped cigarettes from Maryland to Vermont. When stopped in New Jersey he had neither the necessary invoices nor delivery tickets but he was held not subject to a penalty or forfeiture of the cigarettes since he did not intend to evade the New Jersey cigarette tax.

The Maryland Court of Appeals in State v. Sedacca, 252 Md. 207, 249 A.2d 456 (1969), upheld a state statute which made it a criminal offense for untaxed cigarettes to be transported through the state in interstate commerce without invoices or delivery tickets showing the name and address of the consignee. The reason the state could require the documents designated in the statute was to prevent the diversion of cigarettes into illegal trade channels in Maryland where the state would be unable to collect its tax. This police regulation was deemed reasonable, easy to comply with, and non-restrictive on the free flow of trade. The court relied on Carter v. Virginia, 321 U.S. 131 (1944), which, independent of the twenty-first amendment, upheld a more stringent Virginia statute requiring a carrier transporting liquor through Virginia to (1) use the most direct route, (2) have a bill of lading showing the consignee and

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regulations barring trucks longer than 55 feet from the state's highways. The regulations imposed a substantial burden on interstate commerce without making "more than the most speculative contribution to highway safety." Id. at 4114.

that he had legal authority to receive the liquor at the destination, and (3) to post a bond conditioned on lawful transportation through the state.

The Sedacca court noted that in passing the Jenkins State Cigarette Taxes Act,[1] Congress, rather than preempting the field, was attempting to assist the states in collecting cigarette taxes. Under the Act, a person transferring cigarettes for profit in interstate trade into a state taxing cigarettes must report his name and business location, and furnish a copy of the invoice to the state's tobacco tax administrator.

Relying on Sedacca, State v. Gillman, 113 N.J. Super. 302, 273 A.2d 617 (1971), upheld a statute requiring a transporter of unstamped cigarettes on the public highways to be in possession of invoices or delivery tickets.

Taxes on cigarettes which have come to rest within the state have been upheld. See Supervisor of Public Accounts v. Twelve Cases of Smoking Tobacco, 172 So. 364 (La. App. 1937) (cigarettes had come to rest in the carrier's warehouse where they were held subject to the owner's directions); Asta, supra; Ex parte Winn, 61 Okla. 1, 64 P.2d 927 (1937) (purchaser who received cigarettes from out of state took the cartons out of their cases and distributed them to

1. Act of October 19, 1949, as amended, 15 U.S.C. §§ 375-78.

employees for delivery to customers); Flickinger, supra. If the cigarettes have not come to rest, however, they are not subject to state tax. Pfeiffler v. State, 226 Ark. 825, 295 S.W.2d 365 (1956) (cigarettes being transported to Texas through Arkansas from Missouri); State v. 483 Cases, 98 N.H. 180, 96 A.2d 568 (1953) (cigarettes in transit temporarily held but not for sale or use within the state).

Advertising

Post Printing & Publishing Co. v. Brewster, 246 F. 321 (D. Kan. 1917), involved a challenge to the constitutionality of a Kansas statute which prohibited advertising, bartering, giving away, and selling cigarettes or cigarette papers. Plaintiff published a newspaper in Missouri which circulated in Kansas as well. Cigarette sales were permitted in Missouri. The court held that plaintiff's newspaper business constituted interstate commerce which Kansas could not unduly burden. The court enjoined enforcement of the advertising restriction since it would indirectly affect interstate commerce in cigarettes and since such advertising itself constituted a form of interstate commerce.

In 1926, the Utah Supreme Court ruled that a state could not prohibit publication of a nonresident advertiser's tobacco advertisements in a newspaper circulating in interstate commerce, where the sale of the advertised article is not prohibited but merely regulated. State v. Salt Lake Tribune Publishing Co., 68 Utah 187, 249 P. 474 (1926). The court noted that the state could perhaps prohibit the intrastate sales of cigarettes since such sales were not protected by the interstate commerce clause, but wondered why, if it was legal to sell cigarettes it should not also be legal to inform people as to where they may

buy them. 68 Utah at ___, 249 P. at 476. The court noted that both the advertising itself and the cigarettes (in so far as they remained in their original package after shipment into the state) constituted interstate commerce protected from interference by the state.

Little v. Smith, 124 Kan. 237, 257 P. 959 (1927), struck down an act prohibiting the advertising of cigarettes or cigarette papers in any newspaper or periodical published in Kansas. Out-of-state publishers were free to circulate their newspapers carrying cigarette advertisements within Kansas but newspapers published in Kansas were not. The court recognized that advertisement of goods is an essential part of interstate commerce and expressed doubt that the restriction in question served to prevent cigarette sales to minors or to promote the public welfare. Nevertheless, the court conceded that the legislature could regulate and even prohibit cigarette sales within the state. See Austin v. Tennessee, supra; Gundling v. Chicago, supra; State v. Nossaman, supra. To be valid the police power of the state must be exercised within constitutional limits. Therefore, the court held, if a statute enacted under the police power "arbitrarily and unreasonably interferes with or destroys personal or property rights of a citizen or unduly restricts or burdens interstate commerce, it cannot be upheld." 124 Kan. at ___, 257 P. at 960.

Cigarette Smoking

The Nebraska statute at issue in Dempsey v. Stout, 76 Neb. 152, 107 N.W. 235 (1906), prohibited the manufacture, sale, and giving away of cigarettes. Stout was arrested for rolling his own cigarette and smoking it. The Nebraska Supreme Court affirmed the district court's finding that the complaint failed to state an offense under the statute. It concluded that the statute was aimed at prohibiting the business of manufacturing cigarettes for traffic. It was clearly not intended to apply to personal use which included rolling of cigarettes. The court conceded that while the law discouraged the use of cigarettes, "it intentionally avoids forbidding the individual to use them." Id. at ____, 107 N.W. at 235.

In Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911), a Barbourville ordinance prohibiting cigarette smoking within the city limits was an impermissible invasion of personal liberty. The court also found the ordinance void for overbreadth.

> The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in the citizen's own home or on other private premises is an invasion of his right to control his own personal indulgences. The city council is authorized by statute to enact and enforce all such local, police, sanitary, and other

> regulations as do not conflict with general laws. . . . But under this power it may not unreasonably interfere with the right of the citizen to determine for himself such personal matters. If the council may prohibit cigarette smoking in the city, it may prohibit pipe smoking, or cigar smoking, or any other use of tobacco. The Legislature did not contemplate conferring such power upon the council. If the ordinance had provided a penalty for smoking cigarettes on the streets of the city, a different question would be presented; but whether such an ordinance would be valid is a question not now presented or decided.

142 Ky. at ___, 133 S.W. at 986 (citation omitted).

A city ordinance was also at issue in City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914). It made it unlawful for one to smoke tobacco or to have a lighted pipe, cigar, or cigarette within the city's streets, parks, or public buildings. The Illinois Supreme Court found the ordinance void as an "unreasonable interference with the private rights of the citizen . . . ." 262 Ill. at ___, 104 N.E. at 838.

The Zion ordinance was not aimed at protecting public buildings against fire. This distinguished the case from Commonwealth v. Thompson, 53 Mass. (12 Metc.) 231 (1847), which sustained an ordinance prohibiting the carrying of a lighted pipe or cigar in the Boston streets as a fire prevention measure. According to Behrens, Thompson was the only case in the United States sustaining an ordinance prohibiting tobacco smoking in any form on the streets or public grounds.

The Behrens court relied on State v. Heidenhain, 42 La. Ann. 483, 7 So. 621 (1890), in which the Louisiana Supreme Court sustained a narrowly drawn ordinance forbidding smoking in street cars on the ground that it was a nuisance. The court noted that Heidenhain had limited its decision to the conditions outlined in the ordinance. It quoted from Heidenhain:

> "Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable, to those who have acquired the habit, but it is distasteful and offensive, sometimes hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places."

262 Ill. at ___, 104 N.E. at 837, quoting, State v. Heidenhain, 42 La. Ann at ___, 7 So. at 621-22.

The Behrens court recognized that the city had the police power to "prohibit smoking in certain public places." 262 Ill. at ___, 104 N.E. at 837. As the court viewed the issue:

> None of the cases heretofore decided by this court go to the extent of sustaining the power of a city to pass an ordinance forbidding an act under all circumstances which can only be offensive or harmful to others under certain conditions. Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters, and like places where large numbers of persons are crowded together in a small space. But this is quite a different matter from prohibiting

> smoking on the open streets and in parks of a city, where the conditions would counteract any harmful results. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare.

Id.

In Heidenhain, the court dealt with a law making smoking in a street car a misdemeanor. The Louisiana Supreme Court noted the limited nature of the ordinance:

> The ordinance does not deprive the defendant of personal liberty, nor does it invade any right of private property. Smoking is not made an offense, but it is prohibited only in a certain designated place.

42 La. Ann. at ___, 7 So. at 621 (emphasis added).

According to the Louisana court there was no doubt that smoking in street cars annoyed, inconvenienced, and discomforted a majority of citizens, especially during the winter when the cars were closed. In addition, there was "positive danger to health, from the contaminated air." Id. Nevertheless, smoking was seen to be not always offensive: "There are many other habits in manners and conduct which in some localities and places are not objectionable to the public, but when committed elsewhere may become offensive . . . . Smoking may be classed among these subjects . . . ." Id. at 622.

> Much is therefore left to the discretion of the municipal corporation in determining what is a nuisance, and the discretion thus exercised will not be judicially interfered with unless the corporation has been manifestly

> unreasonable and oppressive, invaded private rights, and transcended the power given to it. . . . In the instant case, no private right, either of person or of property, has been violated or invaded. The city council, in passing the ordinance, did not transcend its powers. It had authority, under section 7 of its charter, to provide for the public health. It can therefore require in public places, theaters, halls, etc., that there shall be ventilation for a supply of fresh air; and, in order to preserve the public order and health, and under the general police authority in said section 7, it can compel the owner of public halls and theaters to provide means to prevent fire, and to provide fire-escapes in case of fire, and, in pursuance of the same power, it can, in order to preserve pure and fresh air in crowded halls, and to prevent fire, prohibit smoking in the same. The same authority and the same reasons apply in the prohibition of smoking in street-railway cars. It is essential to health and to comfort to have pure air in them as in any other crowded place.

Id. (citation omitted).

Contrasting with the anti-tobacco sentiment are two recent cases striking down statutes prohibiting private use of marijuana.

In Ravin v. State, 537 P.2d 494 (Alas. 1975), the Alaska Supreme Court ruled that possession of marijuana by adults at home for personal use is constitutionally protected since privacy in the home is a fundamental right. The court found that more than a rational basis is needed for a legislative enactment which breaches the privacy of an individual's home and instead required a showing of a

close and substantial relationship between the intrusion and a legitimate governmental interest. The court distinguished a statute prohibiting use of marijuana while driving which is adequately supported by a mere rational basis since no fundamental right is involved.

A Florida trial court held that the state failed to show that the marijuana prohibition for home use was justified by the need to protect the public health, safety, and welfare. It also concluded that the harsh penalties constituted cruel and unusual punishment in violation of the federal and state constitutions. State v. Leigh, 46 U.S.L.W. 1125 (Fla. Cir. Ct. Jan. 18, 1978).

Conclusion

A state's prohibition of newspaper advertising of tobacco products is likely to be deemed an invalid interference with interstate commerce, and perhaps even a violation of the first amendment. First National Bank v. Bellotti, 46 U.S.L.W. 4371 (U.S. April 26, 1978); Bates v. State Bar, 433 U.S. 350 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). More important, however, there are no definitive statements from the Supreme Court of the United States regarding how much, if at all, the state may infringe upon the associational rights of private property owners when seeking to regulate the conduct of smokers. Indeed, there is little judicial authority of recent vintage on the general issue of cigarette smoking. (What little authority there is either examines the issue from the perspective of the individual smoker or from the perspective of the non-smoker, rather than from the perspective of the owner of private property.)

There are cases which indicate that a state may regulate and perhaps prohibit the intrastate use of tobacco. A ban of in-home use of tobacco is questionable because of the right to privacy as well as the lack of a rational basis. Under its power to raise revenue, a state may tax tobacco but may not unduly encumber interstate commerce.

# CHAPTER VII

## A BIBLIOGRAPHY OF FEDERAL RESEARCH PROJECTS INVESTIGATING THE PHYSIOLOGICAL EFFECTS OF MARIJUANA FOR FISCAL YEARS 1975, 1976, AND 1977

Department of Health, Education and Welfare Secretary Joseph A. Califano, Jr. requested for fiscal year 1978 ("FY 78") an appropriation of $29.5 million for the investigation of the addiction, motivation, and behavior of tobacco smokers.[1] Of the "new" dollars in the request, $6 million will go toward the development of educational materials and $3 million will be added to existing research and development funds. Although fiscal year 1977 ("FY 77") figures have not yet been tabulated, it can be safely assumed from the FY 78 request that approximately $20 million was spent by all federal agencies on tobacco-related research and development in FY 77. In fiscal year 1976 ("FY 76"), approximately $15 million and in fiscal year 1975 ("FY 75"), over $22 million was spent.

A survey of government publications reporting government-funded research on drugs and tobacco[2] indicates that far

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1. W. Sinclair, Califano, A Former Smoker, Tangles With Tobacco Lobby, Washington Post, March 7, 1978, at A-6, col. 1.

2. Federally Supported Drug Abuse Research FY 1975, Vol. I (Inventory and Analysis) and Vol. II (Classified Directory of Researchers), distributed by the National Institute on Drug Abuse [hereinafter 1975 Directory]; Drug

less research has been aimed at the effect of marijuana cigarettes on physical health than at tobacco's effect. This is confirmed by the attached bibliography, comprised primarily of studies extracted from government publications which report what government-financed research[1] has

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Abuse Research and Development: Federally Supported Drug Abuse and Tobacco Research and Development FY 1976, Vol. II (Classified Directory of Researchers), prepared and distributed by the National Institute on Drug Abuse [hereinafter 1976 Directory]. Information for FY 1977 was supplied in part by an unpublished list of NIDA-funded studies and in part by a telephone interview with Jacqueline D. Ludford, Program Analyst of the Research Technology Branch at NIDA, May 5, 1978.

1. The 1975 Directory inventories 15 federal agencies: National Institute on Drug Abuse (NIDA), Department of Labor (DOL), Office of Education (OE), Department of Defense (DOD), Drug Enforcement Administration (DEA), National Institute of Mental Health (NIMH), Veterans Administration (VA), United States Department of Agriculture (USDA), Law Enforcement Assistance Administration (LEAA), Department of Transportation (DOT), Rehabilitation Services Administration (RSA), Food and Drug Administration (FDA), National Cancer Institute (NCI), National Heart and Lung Institute (NHLI), and Center for Disease Control (CDC).

The FY 1976 Directory inventories 22 federal agencies: NIDA, NIMH, NCI, National Heart, Lung and Blood Institute (NHLBI), FDA, CDC, VA, DOD, DOT, DOL, USDA, OE, LEAA, DEA, RSA, National Center for Health Statistics (NCHS), Division of Research Resources (DRR), National Eye Institute (NEI), National Institute of Dental Research (NIDR), National Institute of Environmental Health Sciences (NIEHS), National Science Foundation (NSF), National Institute of Child Health and Human Development (NICH).

Data has not yet been compiled for all the federal agencies which participated in drug and tobacco research during FY 1977. FY 1977 drug-related data for this memorandum is confined to studies financed by the NIDA.

been undertaken to investigate the health hazards of cannabinoids.[1]

A comparison of the proportional amounts allocated to the study of tobacco and to that of cannabinoids can be made easily from data available for FY 75. According to the "preliminary analysis" contained in the 1975 Directory,[2] a total of $22,663,800 was spent on tobacco-related research and development. The National Heart and Lung Institute (NHLI) alone had a budget of $15.5 million for the "identification and study of factors involved in the etiology and treatment of heart and lung diseases" related to the smoking of tobacco.[3] (Emphasis added.) In FY 75, the National Institute

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1. Although "marijuana" is perhaps the most common term for cannabis sativa, the hemp plant from which marijuana and other substances are derived, marijuana is actually composed of the flowering tops and leaves of the plant, usually in loose form, while hashish is the dried cake resin produced from the tops and leaves of the female plant. The term "cannabinoids" includes all varieties of the plant and the substances they contain--in particular, Delta 9-THC (tetrahydrocannabinol), the most active ingredient and that most frequently used in research. Hashish contains a higher concentration of Delta 9-THC than marijuana.

2. See note 2 at p.1 supra.

3. The other two government agencies which supported "smoking and tobacco" research for FY 75 were NCI and CDC. NCI spent $7,034,353, the greatest portion of which (22.4%) was in the field of physiological functions. The report states that "physiological dysfunctions received the majority of ranked entries, referring to impairments caused by lab exposure to smoke or use of tobacco." Perhaps a more significant figure is the percentage, 86.6, of NCI's budget allocated to study of the hazards of "smoking and tobacco." In this category, $5 million alone was spent in FY 75 on a

on Drug Abuse (NIDA), which does almost all the cannabinoid research, spent $4,483,000 on the study of all cannabinoids ($1,241,000 on the study of marijuana alone).

Although the amount spent on tobacco research was reduced in FY 76, it was increased in 1977, and again in 1978, to almost $30 million.

In contrast, cannabinoid research and development real dollars have decreased.[1] In FY 76, all government agencies spent $4.3 million. When the figures have been calculated for the other government agencies participating in cannabinoid research and development for FY 77, the total is not likely to be greater. NIDA's own cannabinoid research and development budget has declined steadily: in FY 75, NIDA spent $4.4 million; in FY 76, $3.8 million; and in FY 77, $3.7 million. Interestingly, NIDA's tobacco research and

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contract "designed to support all requirements for developing a cigarette substitute." Admittedly "heavily funded," this contract "includ[ed] a number of components, including bioassay development, chemotherapy for lung cancer patients, and smoking cessation clinics." 1975 Directory, Vol. I, at XVI 3-4.

CDC's FY 75 dollars ($167,428) were spent in support of "demonstrative programs to develop prevention and therapy strategies for impulsive smoking . . . with total focus on the use of tobacco." 1975 Directory, Vol. I, at XVI 4 (emphasis added).

1. The findings of a recent study undertaken by University of California scientists (and presented to an American Lung Association meeting) which reportedly show that smoking as few as three marijuana cigarettes a day "may significantly harm the lungs, and harm them even more than tobacco cigarettes do," were declared "new and significant" by Dr. Richard Stillman of the National Institute on Drug Abuse. On the one hand,

development budget was increased from $66,000 in FY 75 to $1.3 million in FY 78.[1]

The attached indices, divided by year, concentrate on the studies which have been conducted on the effects of cannabinoids on the heart, lungs, and cardiovascular system generally. While this survey focuses on cannabinoid studies which parallel studies on the alleged effects of tobacco on the human organs, other studies are included: some involve cells (compare this with the alleged carcinogenic effect of tobacco on cells); reproduction (this parallels research on smoking, the pill, and pregnancy); growth ("cigarettes will stunt your growth"); the synthesis of cannabinoids (cf. note 3 at pp.3-4, supra, regarding the "heavily funded" project to produce a cigarette substitute); and the "therapeutic" effects of marijuana (compare with the lack of research into the therapeutic benefits of tobacco).

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Dr. Stillman's statement is ironic since practically all federally sponsored marijuana research to date has been financed through NIDA. On the other hand, it points up the paucity of federally funded research into the physiological effects of marijuana--especially its effects on the lungs--compared with research into the effects of tobacco on the lungs. V. Cohn, A Few Marijuana Cigarettes Weekly Over Long Period May Harm Lungs, Washington Post, May 16, 1978, at B-5, col. 4.

1. Telephone interview with Jacqueline P. Ludford, Program Analyst, Research Technology Branch, NIDA, May 5, 1978.

By studying the government's inventories, it is possible to ascertain the percentage of each study's expenditures which was devoted to cannabinoids or to a specific subcompound thereof, and the percentage devoted to other research.

Bibliography selections have been made on the basis of title alone.[1] Some studies may have been overlooked because by title they did not appear related to physiological effects of cannabinoids. Others may have been wrongly included because they appeared to be related to physiological effects.

The studies are alphabetized by the names of each study's principal investigator. While the funding agency for each project has been named, no designation has been made with regard to whether the money was provided in the form of a contract, a grant, or (as in the case of several VA studies) an intramural program.

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1. The FY 1977 list (attached) also contains some of the "research area key words" NIDA listed in its description of the various projects.

FISCAL YEAR 1975

G. Beall, 9-THC and Cellular Control Mechanisms ($33,755--NIDA).

L. Chapman, Long-Term THC Exposure in Adults and Offspring ($76,311--NIDA).

W. Coates, Inhalation Toxicity of Cannabinoids ($290,537--NIDA).

S. Cohen, Clinical Studies of Cannabinoids in Humans ($387,896--NIDA).

_. Cottrell, Potential Carcinogenicity of Cannabinoids ($15,603--NCI).

M. Dibenedetto, Physiological and Psychological Effects of Chronic Marihuana Use (----VA).

D. Dressler, Marihuana: Pulmonary Bacterial Susceptibility ($46,772--NIDA).

R. Forney, Toxicology of Cannabinoids in Animals and Man (----NIDA).

R. Harbison, Cannabinoids During Pregnancy and Interaction with Drugs ($45,422--NIDA).

H. Hardman, Hypotensive and Hypothermic Responses to Marihuana ($69,259--NIDA).

G. Huber, The Biological Effect of Marihuana on the Lung (----NIDA).

B. Jandhyala, Chronic Cardiovascular Effects of Marihuana ($42,340--NIDA).

R. Karler, Marihuana Related to Anticonvulsive Effects ($67,302--NIDA).

R. Kolodny, Marihuana Use and Female Reproductive Physiology ($76,203---NIDA).

B. Manno, Cardiotoxic Effects of Cannabinoids--Especially Delta 9-Tetrahydrocannabinol ($45,799--VA).

(FY 75 cont.)

G. Nahas, Marihuana Inhibition of Immunity and Cell Replication ($55,135--NIDA).

S. Plog, Therapeutic Aspects of Marihuana, A State of the Art Conference ($29,283--NIDA).

K. Rosen, Cardiovascular Effects of Marihuana (----VA).

H. Rosencrantz, Toxicity of Cannabinoids and Other Compounds ($286,346--NIDA).

J. Solomon, The Effect of Delta-9-THC on Growth ($27,841--NIDA).

G. Stein, Effect of Cannabinoids on Cell Division in Mammalian Cells ($27,535--NIDA).

M. Sullivan, Study of Chronic Marihuana Inhalation (----NIDA).

L. Vachon, Marihuana Effects on Lung and Electroencephalogram ($61,219--NIDA).

M. Wall, Synthesis of Cannabinoids ($134,886--NIDA).

B. Weiss, Drug Self-Administration by Inhalation in the Primate (----NIDA).

L. Woodland, Synthesis and Purification of Cannabinoids ($28,634--NIDA).

FISCAL YEAR 1976

G. Beall, Marihuana, 9-THC, and Cellular Control Mechanisms (----NIDA).

W. Bellville, Marijuana Effects on Respiration and Tracking ($2,976--DRR grant).

L. Chapman, Long-Term THC Exposure in Adults and Offspring ($82,196--NIDA).

I. Coates, Inhalation Toxicity of Cannabinoids ($48,500--NIDA).

S. Cohen, Clinical Studies of Cannabinoids in Humans (----NIDA).

J. Cottrell, Potential Carcinogenicity of Cannabis ($25,945--NCI).

M. Dibenedetto, Physiological and Psychological Effects of Chronic Marihuana Use FY '76 (----VA).

D. Dressler, Marihuana: Pulmonary Bacterial Susceptibility (----NIDA).

i. Eichler, Effect of Delta 9 on Vertebrate Developmental Processes ($7,909--NIDA).

R. Forney, Toxicology of Cannabinoids in Animals and Man ($47,521--NIDA).

E. Frei, Cancer Center Support Grant ($30,000--NCI).

R. Harbison, Cannabinoids During Pregnancy and Interaction with Drugs (----NIDA).

H. Hardman, Hypotensive and Hypothermic Responses to Marihuana ($72,376--NIDA).

G. Huber, Biological Effect of Marihuana on the Lung ($48,565--NIDA).

B. Jandhyala, Chronic Cardiovascular Effects of Marihuana ($36,199--NIDA).

R. Karler, Marihuana Related to Anticonvulsive Effects ($5,000--NIDA).

(FY 76 cont.)

R. Kolodny, Marihuana Use and Female Reproductive Physiology ($32,482--NIDA).

B. Manno, Cardiotoxic Effects of Cannabinoids--Especially Delta 9 ($7,891--VA).

E. Marks, Conference on the Effects of Chronic Cannabis Use ($24,795--NIDA).

D. Morton, Cancer Diagnosis and Therapy ($30,000--NCI).

S. Plog, Therapeutic Aspects of Marihuana, A State of the Art Conference ($5,962--NIDA).

V. Rachal, A Study on the Effects of Marihuana Use ($60,510--NIDA).

K. Rosen, Cardiovascular Effects of Marihuana (----VA).

H. Rosenkrantz, Effect of Marihuana on Reproduction and Gonads ($49,714--NIDA).

H. Rosenkrantz, Toxicity of Cannabinoids and Other Compounds ($170,000--NIDA).

G. Semick, Preparation of 5th Marihuana and Health Report ($888--NIDA).

C. Smith, Marihuana and Reproduction in the Female ($45,043--NIDA).

J. Solomon, The Effect of Delta-9-THC on Growth ($1,299--NIDA).

G. Stein, Effect of Cannabinoids on Cell Division in Mammalian Cells ($26,919--NIDA).

L. Vachon, Marihuana Effects on Lung and Electroencephalogram (----NIDA).

M. Wall, Synthesis of Cannabinoids (----NIDA).

B. Weiss, Drug Self-Administration by Inhalation in the Primate ($13,000--NIDA).

(FY 76 cont.)

L. Woodland, Synthesis and Purification of Cannabinoids ($27,827--NIDA).

E. Wynder, Environmental Carcinogenesis ($25,000--NCI).

FISCAL YEAR 1977

G. Beall, Marihuana, 9-THC and Cellular Control Mechanisms. [Note: research-area key word topics include "therapeutic benefits."]

L. Chapman, Long-Term THC Exposure in Adults and Offspring. [Note: research-area key word topics include "embryonic and fetal development," "perinatal effects," and "effects on infant development."]

S. Cohen, Clinical Studies of Cannabinoids in Humans.

G. Fujimoto, Effect of Marihuana on Reproduction and Gonads.

H. Hardman, Hypotensive and Hypothermic Responses to Marihuana. [Note: research-area key word topics include "brain" and "heart/cardiovascular."]

W. Hembree, Marihuana Effect on DNA in Zygotes. [Note: research-area key word topics include "sex organs/reproductive," "endocrine," "chronic effects," and "effects on infant development."]

G. Huber, The Biological Effect of Marihuana on the Lung. [Note: research-area key word topics include "cell morphology/physiology" and "lung/pulmonary."]

R. Karler, Cannabinoids: Electrophysiological and Anticonvulsant Effects.

H. Rosenkrantz, Effect of Cannabis Inhalation on Reproduction and Gonads.

H. Rosenkrantz, Toxicity of Cannabinoids and Naltrexone.

C. Smith, Marihuana and Reproduction in the Female.

J. Solomon, THC on Reproductive Physiology.

B. Weiss, Drug Self-Administration by Inhalation in the Primate. [Note: purpose of study was to "[t]each Rhesus monkeys to inhale tobacco smoke and subsequently to inhale marihuana through behavioral chaining" in order to "[s]tudy chronic effects."]

L. Woodland, Synthesis and Purification of Cannabinoids.

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